NO. 13-20-00261-CV

In The Court of Appeals
Thirteenth District of Texas at Corpus Christie

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NO. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. & 75 and Sunny Hospitality d/b/a Fairfield Inn & Suites,
Plaintiff-Appellant

v.

MAYSE & ASSOCIATES, INC.,
Defendant-Appellee.

Brief of Appellee, Mayse & Associates, Inc.

Oral Argument Requested

Richard A. Capshaw
State Bar No. 03783800
richard@capslaw.com
Stanhope B. Denegre
State Bar No. 24014734
stan@capslaw.com
CAPSHAW & ASSOCIATES
3500 Maple Avenue, Suite 1100
Dallas, Texas 75219
(214) 761.6610 (214) 761.6611 fax

Lead counsel for Defendant-Appellee Mayse & Associates, Inc.

IDENTITY OF PARTIES AND COUNSEL

Defendant-Appellee
Mayse & Associates, Inc.
Richard A. Capshaw, Stanhope B. Denegre
Capshaw & Associates
3500 Maple Avenue, Suite 1100
Dallas, TX 75219

Plaintiff-Appellant
Certain Underwriters at Lloyd's of London
Paul B. Hines, Jeffrey R. Learned, Michael R. Marx
Denenberg Tuffley, PLLC
28411 Northwestern Hwy., Suite 600
Southfield, MI 40034

Defendant (not a party to this particular appeal)
D 'Amato Conversano, Inc. d/b/a DCI Engineers
Paul Goldenberg, William K. Luyties
Lorance Thompson
2900 North Loop West, Suite 500
Houston, TX 77092

Defendant (dismissed from litigation)
1113 Structural Engineers
Aaron Pool, Mark Younhjohn
Donato, Minx, Brown & Pool
3200 Southwest Freeway, Suite 2300
Houston, TX 77027

Defendant (not a party to any appeal)
KK Builders, LLC
Sachi A. Dave, Jonathan Gitlin
The Patel Law Group
1125 Executive Circle, Suite 200
Irving, TX 75038

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTE

STATEMENT OF THE CASE

Nature of the Case	In this subrogation case, Certain Underwriters ("Underwriters") are suing various Defendants for damages arising out of alleged defective design and construction of a Fairfield Inn & Suites in Rockport, Texas. CR 144-289.
Trial Court	Hon. Janna K. Whatley 343rd District Court of Aransas County, Texas
Course of Proceedings	Defendant Mayse & Associates, Inc. ("Mayse") moved to dismiss Certain Underwriters' causes of action because of Certain Underwriters' failure to file an appropriate certificate of merit as is required by Tex. Civ. Prac. & Rem. Code § 150.002. CR 290-303.
Disposition	The trial court granted the motion to dismiss with prejudice. CR 320-322.

STATEMENT REGARDING ORAL ARGUMENT

Mayse joins in the request for oral argument. No appellate court has reviewed the meaning of "practice in the area of practice of defendant," but the Texas Supreme Court and the Houston Court of Appeals have weighed in on the meaning of "knowledge in the area of practice of the defendant."

The court may have questions about the application of these decisions to this dispute.

STATEMENT REGARDING JURISDICTION

As stated in Mayse's Motion to Dismiss, Mayse contends that the Court does not have jurisdiction over Underwriters' appeal because it was not made timely.

ISSUE PRESENTED

Did the trial court abuse its discretion by dismissing Underwriters' claims against Mayse pursuant to Tex. Civ. Prac. & Rem. Code § 150.002 where Underwriters' certificate of merit was authored by an individual who did not practice in Mayse's area of architectural practice.

STATEMENT OF FACTS

Mayse & Associates, Inc. ("Mayse") was the architect hired by the Owner, prior to the construction, to provide architectural services as well as the "usual and customary structural, mechanical, and electrical engineering services" throughout the duration of the construction project. Plaintiffs' Petition CR at 4-143.

On February 3, 2015, Mayse entered into a contract (AIA Document B101 – 2007 *Standard Form of Agreement Between Owner and Architect*) ("Contract") with Underwriters' insured to provide architectural services for the hotel project at issue ("Project"). The Underwriters attached this Agreement to their Petition against Mayse but did not attach the Contract to their Petition against Mayse found in their appendix. This Contract, CR 125 – 139, is attached to Mayse's Appendix "MA" MA1-MA15**.** In this Contract, the Project is described as follows:

> *Fairfield Inn & Suites*
> *Rockport, Texas*
> *This project consists of an 85-room, four-story, wood-frame Marriott Fairfield Inn & Suites Hotel, which includes a lobby, administrative areas, laundry, employee break room, exercise room and breakfast room, situated on a site at the intersection of TX Hwy 35 and Fulton Avenue in Rockport, Texas*.
>
> *Design shall be based on the concept design by Mayse & Associates dated 10-28-14 and the current Marriott Prototype, with modifications to enhance the overall project per Owner requirements and based on the site plan approval process*.

Among other things, this contract provides for:

Article 2 *ARCHITECT'S RESPONSIBILITIES;*

Article 3 *SCOPE OF ARCHITECT'S BASIC SERVICES;*

Article 3.2 *SCHEMATIC DESIGN PHASE SERVICES;*

Article 3.3 *DESIGN DEVELOPMENT PHASE SERVICES;*

Article 3.4 *CONSTRUCTION DOCUMENTS PHASE SERVICES;*

Article 3.6 *CONSTRUCTION PHASE SERVICES;*

Article 3.6.2 *EVALUATIONS OF THE WORK;*

Article 3.6.4 *SUBMITTALS;*

Article 3.6.5 *CHANGES IN THE WORK;*

Article 4 *ADDITIONAL SERVICES;*

Mayse prepared construction drawings for the building. Mr. Itle states in his Affidavit that, "I was provided a set of construction drawings for the subject building prepared by Mayse & Associates, Inc., as Architect of Record, with a cover sheet entitled "Issued for Construction (with ASI Revisions)" and dated July 19, 2016. This set appears to be a final record set of drawings issued after substantial completion of construction."

Affidavit of Mr. Itle, CR 299-301.

The Hotel was fully constructed sometime in 2016, around a year prior to the August 25, 2017 date of loss. Plaintiffs' Petition CR at 4-143.

On or about August 25, 2017 the Hotel sustained damages as a result of Hurricane Harvey. Plaintiffs' Petition CR at 4-143.

On September 19, 2019, Underwriters filed suit against Mayse and the other defendants in this suit: the general contractor, KK Builders LLC, an engineering consultant, 1113 Structural Engineers, PLLC, and the structural engineer, D'Amato Conversano, Inc. d/b/a DCI Engineers. Underwriters noted in the suit that limitations would expire in ten days and pursuant to the Tex. Civ. P. & Rem. Code §150.002(c) Underwriters needed an additional thirty days to file a Certificate of Merit against Mayse.

On September 19, 2019, Underwriters supplemented their pleading against Mayse including an Affidavit from Kenneth Itle ("Mr. Itle"), Underwriters' Certificate of Merit against Mayse. CR 299-301. In this Affidavit, Mr. Itle stated his only qualifications:

> I am a Texas licensed architect, License No. 20760. I first obtained licensure as an Architect in the State of Illinois in 2005. Since 2000, I have worked at Wiss, Janney, Elstner Associates, Inc. (WJE), where my practice has included investigation of existing buildings to diagnose problems such as water infiltration and to develop repairs, as well as peer review and technical support services to other architects and professionals during design for new construction.

On September 30, 2019, Appellee, Mayse, moved to dismiss Underwriters' case against Mayse because the Certificate of Merit Affidavit provided by Underwriters was insufficient under Tex. Civ. Prac. & Rem. Code§ 150.002. [Mayse's Motion, CR 290-296].

After full briefing (and a June 5, 2020 hearing -- see Reporter's Record 27-28), on June 11, 2020 the District Court granted Mayse's Motion, dismissing Underwriters' claims against Mayse with prejudice. [Order, CR 320-321. Note - the short Reporter's Record contains hearings on Motions to Dismiss by 1113 Structural Engineers and Mayse. The Mayse hearing begins at Reporter's Record 27]. At the close of the hearing, Judge Whatley advised:

> THE COURT: Okay. Well, it looks like to me what the big crux of the issue is, is the two experts that you are relying upon for your affidavit purposes are, basically, forensic experts. They are not actively practicing in the area. And that's the complaint of the two defendants, if I understand -- narrowing it down in a quick nutshell.
>
> And I see Mr. Denegre shaking his head. Am I accurate, Mr. Youngjohn?
>
> MR. YOUNGJOHN: Yes, Your Honor.
>
> THE COURT: All right. Well, it is a highly technical issue. I don't have the statute before me today and I haven't read any case law history, but I will tell you, Mr. Marx, I am looking at granting their motion right now on those grounds.
>
> So I will make a formal ruling when I have had the opportunity to look at the documents and let me do some research on my own. But I think

> there is a huge difference in forensics and practicing. And that's this Court's opinion. You can take note of that and the Court of Appeals will allow you to do that. But that's my thinking today. But I am not ruling today. You will get notice once I do.

27-28

Subsequent to Mayse's hearing, the Underwriters Non-suited 1113 and the Court dismissed the Underwriters' claims against DCI, the subject of a separate appeal.

SUMMARY OF THE ARGUMENT

The District Court's dismissal of Underwriters' claims against Mayse was proper because Mr. Itle did not practice in Mayse's area of practice.

In *Levinson Alcoser Assocs., L.P. v. El Pistolón II, Ltd.*, 513 S.W.3d (Tex. 2016), the Texas Supreme Court made it clear that the defendant's area of practice is determined by referencing the project at issue in this Lawsuit.

Given the change of the statute and *Levinson's* discussion of the meaning of "in the area of practice of defendant" the cases cited by Underwriters are irrelevant and only demonstrate the weakness of information in the record about Mr. Itle's practice.

ARGUMENT

The District Court's dismissal of Underwriters' claims against Mayse was proper because Mr. Itle's Affidavit did not meet the statute's requirement that he practice in Mayse's area of practice

Standard of review

> An order granting or denying a motion to dismiss under chapter 150 of the Texas Civil Practice and Remedies Code is immediately appealable as an interlocutory order. *Id.* § 150.002(e). This Court reviews the denial of a defendant's motion to dismiss pursuant to section 150.002 under an abuse of discretion standard. *Criterium–Farrell Eng'rs v. Owens,* 248 S.W.3d 395, 397 (Tex. App.-Beaumont 2008, no pet.); *see also Palladian Bldg. Co., Inc. v. Nortex Found. Designs, Inc.*, 165 S.W.3d 430, 433 (Tex. App.-Fort Worth 2005, no pet.); *Gomez v. STFG, Inc.*, No. 04–07–00223–CV, 2007 WL 2846419, at *1 (Tex. App.-San Antonio Oct.3, 2007, no pet.) (mem.op.). Merely because a trial court may decide a matter within its discretion in a different manner than an appellate court does not demonstrate an abuse of discretion. *Palladian,* 165 S.W.3d at 433.
>
> Statutory construction is a question of law we review de novo. *Id.* at 436. Once we determine the statute's proper construction, we must then decide whether the trial court abused its discretion in applying the statute. *Id.* A trial court has no discretion in determining what the law is or applying the law to the facts. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex.1992).

Landreth v. Las Brisas Council of Co-Owners, Inc., 285 S.W.3d 492, 496 (Tex. App.—Corpus Christi 2009, no pet.),

> The issue is one of statutory construction, a legal question we review de novo. *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006). When statutory text is clear, we do not resort to rules of construction or extrinsic aids to construe the text because the truest measure of what the Legislature intended is what it enacted. *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016). And we endeavor to read statutes contextually to give effect to every word, clause, and

> sentence. *In re Office of Attorney Gen.*, 422 S.W.3d 623, 629 (Tex. 2013). We also typically give statutory terms their ordinary or common meaning unless context or a supplied definition indicates that a different meaning was intended. *Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 765 (Tex. 2014).

Melden & Hunt, Inc. v East Rio Hondo Water Supply Corp.,
520 S.W.3d 887, 893 (Tex. 2017)

The Certificate of Merit Act imposes no particular requirements or limitations as to how the trial court ascertains whether the affiant possesses the requisite knowledge. *Melden & Hunt, Inc. v East Rio Hondo Water Supply Corp.,* 511 S.W.3d 743 (Tex. App. - Corpus Christi-Edinburg 2015), *aff'd*, 520 S.W.3d 887 (Tex. 2017). A trial court cannot assume or infer that an expert knows something about the defendants' area of practice unless there is some evidence to suggest that he does. ***Levinson Alcoser Assocs., L.P. v. El Pistolón II, Ltd.*, 513 S.W.3d 487, 495 (Tex. 2016) ("*Levinson*")**

The Certificate of Merit Act. Chapter 150 of the Texas Civil Practice and Remedies Code (The Act") requires that a certificate of merit affiant practice in the area of practice of the defendant.

The Act requires that a sworn "certificate of merit" ("COM") (affidavit) accompany any lawsuit complaining about the provision of professional services by a licensed architect, professional engineer, registered professional land surveyor, or registered landscape architect. The only part of the certificate of merit requirement that is relevant to this appeal deals with the level of familiarity the third-party professional providing the affidavit (in this case Mr. Itle) must have with Mayse's

area of practice. This is found in Tex. Civ. Prac. & Rem. Code §150.002(a) (the current and two former versions of this statute are in Underwriters' Appendix at pp. 28-33).

The Act identifies those who are qualified to render a certificate of merit. Over the years the Act's requirements for the qualifications of the architect affiant have changed. This is found in Tex. Civ. Prac. & Rem. Code §150.002(a) (the current and two former versions of this statute are in Underwriters' Appendix at pp. 28-33).

(From Underwriters' Brief)

"Section 150.002 has undergone significant change over the past 15 years. From September 2005 through August 2009, §150.002(a) required that the third-party professional be:

> [C]ompetent to testify, holding the same professional license as, and practicing in the same area of practice as the defendant.

[App. p. 32] [underscoring and emphasis added].

In 2009 the Texas Legislature amended §150.002(a), making it easier for a third-party professional to be viewed as qualified to provide the certificate of merit affidavit. Under this new rule, the third-party professional must be someone who:

(1) is competent to testify;

(2) holds the same professional license or registration as the defendant; and

(3) is knowledgeable in the area of practice of the defendant.

[UW App. p. 30] [underscoring and emphasis added]. This change reduced the requisite level of the third-party professional's familiarity with the defendant's area of practice from "practicing in" to simply being "knowledgeable" in the defendant's area of practice". (End of Underwriters' Brief.)

Relatively recently -- effective June 10, 2019 -- the Legislature again amended § 150.002(a). It raised the requisite level of the third-party professional's familiarity with the defendant's area of practice by requiring that the affiant actually practice in the defendant's area of practice rather than just knowing about it. In its current form, §150.002(a) states that for a certificate of merit affidavit to be sufficient, the third-party professional must be someone who:

1. Is competent to testify;
2. **Is a licensed architect in Texas and actively engaged in the practice of architecture**;
3. **Practices in the area of practice of the defendant and offers testimony based on the person's**:

    (A) knowledge;
    (B) skill;
    (C) experience;
    (D) education;
    (E) training; and
    (F) practice.

In *Levinson*, the Texas Supreme Court looked for information about the project at issue to determine whether the affiant had knowledge (it was a 2009 statute "Knowledge" case) "in the area of practice of the defendant".

Underwriters note that no appellate court has discussed the current statute's requirement that the affiant "practices in the area of practice of the defendant." The Underwriters failed to mention that in *Levinson*, the Texas Supreme Court did discuss the meaning of "defendant's area of practice" under the 2009 "knowledge" act, and concluded that a court should reference the underlying project to determine a defendant's "area of practice."

The Houston 1st District Court of Appeals has followed *Levison's* requirement that "defendant's area of practice" should reference the underlying project. *See Jacobs Field Services North America, Inc. v. Williford*, 2018 WL 3029060 Tex App. Houston (1st district), discussed below.

The 2019 statute essentially substitutes "practicing in" for "knowledge of". *See* Mayse App. MA16-MA17. A page from Westlaw that demonstrates this.

Because Mr. Itle's Affidavit is so bereft of information, Underwriters understandably ignore *Levinson* (and *Jacobs*) and put forward arguments that seek to distance the "practices in the area of practice of defendant" requirement from consideration of the affiant's practice experience on projects similar to the project at issue in this suit. This is the very approach that the Texas Supreme Court rejected in *Levinson*.

At issue in *Levinson*, was the lower courts' approval in an architectural negligence suit wherein the COM affiant, Gary Payne, described his expertise as:

> "1. My name is Gary Payne. I am a professional architect who is registered to practice in the State of Texas, license number 11655. I have been a registered architect in Texas since 1980 and have an active architecture practice in the State of Texas today.
>
> 2. I am over the age of eighteen years, have never been convicted of a felony or crime of moral turpitude, and am otherwise competent to make this affidavit. I have personal knowledge of the facts contained in this affidavit. Those facts are true and correct."

The lower courts approved that affidavit finding that his licensure and active engagement in the practice sufficed. The Texas Supreme Court concluded that the information in the affidavit was insufficient.

> The court of appeals' opinion, however, does not identify a source for such an inference other than Mr. Payne's affidavit. **Nor does El Pistolón refer us to anything in the record from which to infer Mr. Payne's knowledge or background in the design of shopping centers or other similar commercial construction.** Indeed, all that we know about Payne's architectural qualifications and experience is that provided in his affidavit, which does not describe any familiarity with, or knowledge of, defendants' area of practice.
>
> 513 SW 3d at 493 (emphasis added)
>
> While the affidavit provides some of the relevant information, the architects point out that it does not provide any information about Payne's knowledge of their area of practice as section 150.002(a)(3) requires.

513 SW 3d at 492 (emphasis added)

> We conclude then that the statute's knowledge requirement is not synonymous with the expert's licensure or active engagement in the practice; it requires some additional explication or evidence reflecting the expert's familiarity or experience with the practice area at issue in the litigation. Here, we have no such evidence.

513 SW 3d at 494.

Levinson was a 2009 statute "knowledge" case, but in it the court discusses the meaning of the nearly identical wording at issue, "area of practice of defendant", in the 2019 statute. Clearly, a "practice" requirement is and was meant to raise the affiant's familiarity with the defendant's area of practice. (Appellant Brief at 10). As stated above, the court looked to the underlying Project in understanding the defendant's area of practice.

The Houston 1st District Court of Appeals has followed *Levison's* requirement that "defendant's area of practice" should reference the underlying project.

Jacobs Field Services North America, Inc. v. Williford, 2018 WL 3029060 Tex App. Houston (1st district) , a 2009 COM statute ("knowledge") case, involves, among other issues, whether the affiant had knowledge of the defendant's area of practice. (Mayse Appendix at M26-M35) The lower court had concluded that the affiant's experience found in the Record sufficed. Citing *Levinson,* the court found that the affiant had listed experience, but none of it related to the defendant's work on the project at issue.

***10** Willeford's argument is essentially that because the system failed, every component of the system failed. That may or may not be true, but *Jacobs* has broken its component of the system out of the system and challenged Willeford to show in what particular way it failed. The first step Willeford must take is to satisfy the requirements of section 150.002 with a certificate of merit which demonstrates that the expert called upon to criticize the computer programming and installation is qualified to do so. There is nothing in Perkin's curriculum vitae or his affidavit showing that he possesses knowledge regarding the role that computer programming played in the system's alleged failure. While Perkins is, based on his certificate of merit, qualified to review and criticize the coordination, design, and functioning of complex refinery systems, there is nothing in the record which indicates his expertise in the area of computer programing, design, or installation. The certificate of merit does not meet the standards of section 150.002 with regard to Jacobs.

Because nothing exists in Perkin's certificate of merit affidavit, or elsewhere in the record, indicating that Perkin possesses knowledge of Jacobs's practice area, Perkin has not shown himself qualified to render the certificate of merit. The trial court erred in denying Jacobs's motion to dismiss. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(e) (requiring dismissal when plaintiff fails to file compliant affidavit). Accordingly, we sustain Jacobs's issue.[14]

2018 WL 3029060 *10 (emphasis added)

Mr. Itle's affidavit states no experience regarding the design of hotels like the hotel at issue or any similar project. The Record's only information about Mr. Itle's qualifications is contained in his COM.

> I am a Texas licensed architect, License No. 20760. I first obtained licensure as an Architect in the State of Illinois in 2005. Since 2000, I have worked at Wiss, Janney, Elstner Associates, Inc. (WJE), where my practice has included investigation of existing buildings to diagnose problems such as water infiltration and to develop repairs, as well as peer review and technical support services to other architects and professionals during design for new construction.

Note: In his COM, Mr. Itle does not:

> Say that he is actively engaged in the practice of architecture;
>
> Attach a CV;
>
> Say that he practices in Mayse's area of practice;
>
> Say that he has knowledge of Mayse's area of practice;
>
> Say that his practice includes the Rockport area;
>
> Say that he is currently performing professional services on a project like the one at issue;
>
> Say that he has ever performed professional services on a project like the one at issue;
>
> Say that he has ever been a party to sign a contract like the Contract; and
>
> Describe any work history that would lead one to believe that he practiced in Mr. Mayse's area of practice.

Because Mr. Itle's COM offers no knowledge or background in the design of the building at issue in this suit or other similar commercial construction, Judge Whatley correctly dismissed Underwriters' claims against Mayse.

Reading "same" into the statute is not reversible error.

Underwriters seek to draw the court's focus away from Mr. Itle's affidavit and speculate on what the outcome would have been in this case if the statute had not been characterized as requiring that the affiant practice in the "same" area of practice as defendant.

Given the *Levinson* and *Jacobs* decisions and Mr. Itle's lack of knowledge or background in the design of projects like the hotel at issue, or other similar commercial construction, characterizing "practicing in the area of practice of defendant" as "practicing in the **same** area of practice of defendant" is not reversible error.

Mayse submits that there is no difference in the ordinary meanings of the following phrases:

"in the area of practice of defendant"

"in the same area of practice as defendant."

This similarity of meaning is demonstrated by the fact that courts, including this court injected "same" in the area of practice clause in cases involving the 2009 statute, which does not have "same" in the clause:

"Knowledgeable in the area of practice of defendant".

BHP Engineering and Construction, L.P. v *Heil Const. Mgt., Inc*., No. 13-13-00206-CV (Tex. App. - Corpus Christi-Edinburg 12/5/13, no pet.) (2013 W.L. 9962154).

1. The Licensed Engineer's Qualifications

Section 150.002(a)(3) directs us to look at the affiant's knowledge, skill, experience, education, training, and practice to determine if they are qualified to provide the certificate of merit. TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(a)(3)(A)-(F). The affiant must hold the same professional license or registration as the defendant and be knowledgeable in the **same** area of practice of the defendant. *See id.* § 150.002(a)(2)-(3).

(emphasis added)

2013 W.L. 9962154 *4.

Benchmark Eng'g Corp. v. Sam Houston Race Park, 316 S.W.3d 41, 44 (Tex.App.-Houston [14th Dist.] 2010, pet. dism'd by agr.)

H.B. 854 expanded application of chapter 150 to include registered professional land surveyors. *See* Act of May 12, 2005, 79th Leg., R.S., ch. 189, § 2, 2005 Tex. Gen. Laws 348, 348 (amended 2009). H.B. 1573 further expanded the scope of chapter 150 to include, among other matters, (a) allegations of damages brought in arbitration proceedings, and (b) damages arising out of the rendition of professional services (as opposed to allegations only of professional negligence). Act of May 18, 2005, 79th Leg., R.S., ch. 208, § 2, 2005 Tex. Gen. Laws 369, 369–70 (amended 2009). S.B. 1201 broadened the scope of chapter 150 by (a) including registered landscape architects, (b) reducing the affiant's qualification requirement **from "practicing in the same area" as the defendant to "knowledgeable" in the same area as the defendant**, and (c) expanding the affidavit requirement to set forth "for each theory of recovery for which damages are sought, the negligence, if any, or other action, error, or omission of the licensed or registered professional in providing the professional service...." *See* Act of May 29, 2009, 81st Leg., R.S., ch. 789, § 2, 2009 Tex. Gen. Laws 1991, 1991–92 (codified at Tex. Civ. Prac. & Rem. Code § 150.001 et seq. (Vernon Supp.2009)).

316 S.W. 3d 41, 44 (emphasis added)

In *Gaertner* v. *Langhoff*, 509 S.W.3d 392 (Tex. App. - Houston [lst Dist.] 2014, no pet.)

> According to Langhoff, the trial court properly denied Gaertner's motion to dismiss because the record establishes that Bueker is knowledgeable in this same area of "Architectural Design and Construction Management." He points to the record evidence that Bueker has been a registered, practicing architect in Texas for over thirty years. He has been the architect of record on at least twenty buildings in the last fifteen years and has provided architectural design services for at least 500 single-family homes and a multitude of commercial properties, including office, medical, retail, and banking buildings. The record reflects that he has extensive construction management and development experience as well. Because the record reflects that he has experience and knowledge in the same area as Gaertner practices, Langhoff argues that Bueker need not establish more. We agree that the record supports the trial court's conclusion that Bueker is knowledgeable in the **same** area that Gaertner practices. Accordingly, the trial court did not abuse its discretion by denying Gaertner's motion to dismiss.

509 S.W. 3d at 394 (emphasis added)

The "Original Author's/Sponsor's Statement of Intent" found in Underwriters' appendix states the intent of the statute as written meant that the new law required the affiant to actually practice in the **same** area as the defendant, which would mean that the affiant has experience in the area rather than just claiming "knowledge" of it.

> Also, under current law, the affiant must have knowledge in the area in which the defendant practices. **S.B. 1928 would require the affiant to actually practice in the same area as the defendant, which would mean that the**

> **affiant has experience in the area rather than just claiming "knowledge" of it.** This is similar to the requirement in medical malpractice suits.
>
> Appellant's Appendix PP 44-45

It is not dispositive of the issue, but reading the statute to require that the affiant practice in the **same** area of practice as defendant does not lead to any different result in this case because Judge Whatley's ruling was in line with *Levinson*.

Because Mr. Itle did not practice in Mayse's area of practice (which *Levinson* defines in reference to the underlying project), Underwriters have offered a number of irrelevant arguments to divert the court's focus away from scrutinizing Mr. Itle's Affidavit, which demonstrates no experience in Mayse's area of practice.

The statute requires more than a general architectural practice.

Mr. Itle does not say that he is engaged in any type of architectural practice. Underwriters' make a tortured argument that the statute just requires a general practice of architecture or that Mr. Itle is engaged in actions that are not supported in his Affidavit.

Practice in Mayse's area of practice requires more than just having a license and doing some things that fall within the practice of architecture. Under the Texas Supreme Court's reasoning in *Levinson*, the "practice in the area of practice of the defendant" must relate to the underlying project. Mr. Itle's water intrusion consulting and undefined peer review and technical support services does not

demonstrate the requisite knowledge or background in the design of four-story hotels or other similar commercial construction. The court in *Levinson* rejected Underwriters' argument:

> We conclude then that the statute's knowledge requirement is not synonymous with the expert's licensure or active engagement in the practice; it requires some additional explication or evidence reflecting the expert's familiarity or experience with the practice area at issue in the litigation. Here, we have no such evidence. Although we generally agree that such knowledge may be inferred from record sources other than the expert's affidavit, here the affidavit is all we have of Payne's qualifications. Because nothing exists in Payne's affidavit from which to draw an inference that Payne possessed knowledge of the defendants' area of practice beyond the generalized knowledge associated with holding the same license, we conclude that Payne has not shown himself qualified to render the certificate of merit. And, because the certificate-of-merit statute requires dismissal when the plaintiff fails to file a compliant affidavit, TEX. CIV. PRAC. & REM. CODE § 150.002(e), we conclude the court of appeals erred in affirming the trial court's order denying the motion to dismiss.
>
> *Levinson* at 494 (emphasis added)

The Texas Supreme Court rejected this argument in *Levinson* and the court should also reject it in this case.

Underwriters miss the point about any reference to forensics.

The fact that an otherwise qualified affiant may do forensic work is of no moment. Cleary, Mr. Itle does not fit in this category. The cited cases on this issue, *Howe* and *Nortex* cases are also part of Underwriters' "specialty" argument, which

Mayse has not made. The information available in the record about the affiants in *Howe* and *Nortex* far exceeded the paucity of information in Mr. Itle's Affidavit.

Howe-Baker Engineers, LLC v Enterprise Products Operating, LLC, No. 01-09-01087-CV (Tex. App. - Houston [lst Dist.] 4/29/11, no pet.) (2011 W.L. 1660715).

> The record reflects that the trial court could have reasonably concluded that Kirkpatrick, Howe–Baker, and CB & I shared the same "area of practice" as it relates to the allegations in the petition and the supporting statements in the affidavit. Kirkpatrick is a registered professional engineer with general experience in the gas-processing industry and specific experience with technical investigations, process and project engineering, and economic aspects of operating plants. His experience includes evaluation of construction performance, engineering errors and omissions, and the effects of business interruptions. This area of practice relates to and overlaps with the appellants' general areas of practice in the field of engineering design services. They have failed to articulate any specific argument to support their contention that Kirkpatrick's work in their shared area of practice has no application to their claim to practice in a more specialized field relating to cryogenic natural gas processing plants and the design of industrial facilities. Accordingly, we conclude that the trial court's ruling should not be disturbed on the basis of any objection to the qualifications of the section 150.002 affiant.

2011 W.L 1660715 at *5

In Nortex Foundation Designs, Inc., v Ream, No. 02-12-00212-CV (Tex. App. - Fort Worth 7/11/13, no pet.) (2013 W.L. 3488185) The affiant provided this information:

> I am a Texas–Licensed Professional Registered Engineer. Attached as Exhibit 1 is a copy of my Curriculum Vitae. I have been a Licensed Professional Engineer in the State of Texas since 1994, specializing in geotechnical engineering and structural engineering and am familiar with the proper engineering and construction techniques as part of my education and experience. I am actively engaged in the practice of geotechnical engineering

and structural engineering in the North Texas area and the Dallas–Fort Worth Metroplex in particular. I am familiar with standard industry practice in North Texas for professional engineers. In terms of my employment, I have inspected a number of residences that have suffered from structural problems. I have reviewed structural designs of residential structures on many occasions and am familiar with analyzing the damages to determine the cause or causes. Further, I have engineered residential concrete foundations as a part of my structural design practice.

***2** 3. As a licensed engineer with the foregoing educational and professional background and experience, I am familiar with minimum industry standards relating to the design and construction of residential structures, such as the Reams' home, as well as the minimum standards relating to the design and construction of foundation systems for residential structures, such as the foundation used at the Reams' residence, including design of foundations on expansive soils.

Mansour stated that he had inspected the Reams' foundation using the procedure of the Post–Tensioning Institute and International Building Code. Mansour's resume, which he attached to his affidavit, lists his experience in geotechnical, structural, and forensic engineering.

Mansour's affidavit does not name specific types of foundation design with which he was familiar. His resume states that "[i]n the last five years, [Mansour] provided thousands of foundation evaluations for homeowners, foundation repair contractors, insurance companies[,] and attorneys."

2013 W.L. 3488185 at *1-*2

The trial court accepted the affidavit.

Underwriters' "Specialty" argument does not apply.

Mayse has not made a "specialty" argument. As an aside, the information available in the record about the affiants in Underwriters' referenced cases far exceeded the paucity of information in the Itle affidavit.

BHP Engineering and Construction, L.P. v *Heil Const. Mgt., Inc.*, No. 13-13-00206-CV (Tex. App. - Corpus Christi-Edinburg 12/5/13, no pet.) (2013 W.L. 9962154) is a 2009 "knowledge" case involving engineers. The court upheld the trial court's conclusion that the affiant had the requisite knowledge of the defendant's area of practice.

> Budinger's curriculum vitae establishes that he has a Bachelor of Architecture (Engineering Option) from the University of Illinois–Champaign in Urbana, Illinois. He is a "licensed professional engineer" in three states, including Texas, and a "registered architect" in nine states, including Texas. In his thirty years of work experience, he has designed multiple structures, including "complex hazardous material storage facilities." Budinger claims he has expertise in "engineering design, failure analysis, construction and facilities management and cause and origin of building component failures."
>
> BHP contends that Budinger is not qualified to provide a certificate of merit in this case because he is a structural engineer and not a chemical engineer. We disagree. Chapter 150 "does not state that the affiant's knowledge must relate to the same, much less the same specialty, area of practice," as BHP contends. *Dunham Eng'g, Inc. v. Sherwin–Williams Co.,* 404 S.W.3d 785, 794 (Tex.App.–Houston [14th Dist.] no pet.). "Indeed, section 150.002 'imposes no particular requirements or limitations as to how the trial court ascertains whether the affiant possesses the requisite knowledge.' " *Id.* (citing *M–E Engineers, Inc. v. City of Temple,* 365 S.W.3d 497, 503 (Tex.App.–Austin 2012, pet. denied)). Heil's claims against BHP involve the alleged defective

design of the Stab Building, which was intended to store and convert hazardous waste products. Budinger, a licensed engineer and registered architect in Texas, has experience designing hazardous material storage structures. His expertise also includes failure analysis and determining the cause and origin of structure failure.

Budinger's "knowledge, skill, experience, education, training, and practice" demonstrate that he has knowledge "in the same area of practice of the defendant" in this case. ***Id.*** We hold that the trial court did not abuse its discretion in holding that Budinger was qualified to render a certificate of merit.

2013 W.L. 9962154, (emphasis added)

Dunham Engineering, Inc. v *Sherwin-Williams Company*, 404 S.W.3d 785 (Tex. App. - Houston [14th Dist.] 2013, no pet) This is another "knowledge" case involving engineers. The court upheld the trial court's conclusion that the affiant had the requisite knowledge of the defendant's area of practice.

[13] In this case, the trial court had before it O'Connor's sworn certificate indicating that he holds a Ph.D. in civil engineering, is licensed by the State of Texas as a professional engineer with the designation of "civil," and currently serves as a professor in project management within the civil, architectural, and environmental engineering department at the University of Texas. This sworn certificate also indicated that O'Connor, "[t]hrough [his] practice, research, and teaching, [is] familiar with both the legal requirements and industry customs regarding competitive bidding on public works projects, particularly in the State of Texas." In addition, Sherwin–Williams alleged, and DEI does not dispute, that DEI provides professional engineering services and Dunham is a licensed professional engineer in Texas, and that DEI and Dunham were involved in the preparation and direction of plans and specifications for a Texas public works project. Finally, Dunham's credentials indicate that he is a professional engineer licensed in Texas who holds a master's in civil engineering. On this record, we cannot conclude the

> trial court abused its discretion in determining that O'Connor "is knowledgeable" in DEI's area of practice, as required by section 150.002(a)(3). Thus, we overrule DEI's first issue.

Other cases cited by Underwriters stand for the proposition that, unlike Mr. Itle's affidavit, the COM's at issue presented enough information about the affiant to satisfy the statue under discussion.

H W. Lochner, Inc. v *Rainbo Club, Inc.*, No. 12-17-00253-CV (Tex. App. - Tyler 2018, no pet.) (2018 W.L. 2112238) is another engineering case involving the 2009 "knowledge" statute. The defendant alleged that the affiant did not have requisite knowledge of defendant's "sub-specialty," construction engineering services. Based upon the information in the affidavit, the trial court found the affiant's experience to be sufficient:

> In his affidavit, Womack states he holds a Bachelor of Arts degree with a major in Civil Engineering from The University of Texas at Austin, and a Master of Business Administration from The University of Texas at Dallas. He states he has been engaged in the practice of Civil Engineering for over twenty-six years and has specialized knowledge, skill, practice, training, and technical expertise in the design and construction of roadways, having been previously employed by the Texas Department of Transportation. He holds a professional license in the field of civil engineering of which roadway design and construction are areas of practice. He states that he practices engineering extensively in the field of civil engineering and has been "actively engaged in the engineering aspects of roadway design and construction" including having designed, reviewed, and inspected SW3P plans. He repeats that he is "knowledgeable about the design and construction which the defendants were responsible for," is licensed in Texas to perform the "required analysis civil engineering work," and has "actively engaged in the practice of engineering

in areas encompassing such design and construction practices." We conclude that these statements reflect Womack is sufficiently knowledgeable in the practice area of engineering inspection to satisfy the requirement of Section 150.002(a). *M–E Eng'rs, Inc.*, 365 S.W.3d at 503; *Morrison Seifert Murphy, Inc.*, 384 S.W.3d at 427. Accordingly, we overrule Lochner's second issue.

2018 W.L. 2112238 *3

Morrison Seifert Murphy, Inc. v *Zion,* 384 S.W.3d 421 (Tex. App. - Dallas 2012, no pet.) is another sub-specialty case. The court found the information about the affiant's experience to be sufficient to meet the requirements of §150.002.

[11] [12] Although the case law cited by MSM, *Landreth*, 285 S.W.3d at 497–500, *Broders*, 924 S.W.2d at 151–54, and *Gammill*, 972 S.W.2d at 718–20, addresses expert witness qualifications, the cases do not direct that we require that Drebelbis's affidavit demonstrate practice in the same sub-specialty as MSM. The plain language of § 150.002(a), which we are bound to apply, specifically states only that the professional opining in the certificate of merit must be "knowledgeable in the area of practice of the defendant." TEX. CIV. PRAC. & REM. CODE ANN.. § 150.002(a). We cannot stray from the plain language of the statute. *See Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex.1999) ("[W]hen we stray from the plain language of a statute, we risk encroaching on the Legislature's function to decide what the law should be."). Drebelbis's affidavit states: "By virtue of my knowledge, skill, education, training, and professional experience and practice, I therefore have personal knowledge of the general acceptable standards for the practice of architectural services in the State of Texas and specifically of the same area of practice as MSM." We conclude Drebelbis's statement that he is knowledgeable in the area of practice of MSM is sufficient to meet the requirements of §150.002. *See Elness*, 2011 WL 1562891, at *2. Accordingly, we decide MSM's first issue against it.

384 S.W.3d at 427

In *Gaertner* v *Langhoff*, 509 S.W.3d 392 (Tex. App. - Houston [lst Dist.] 2014, no pet.) the court rejected the defendant's "specialty" argument and found that the information in the record supports the trial court's conclusion that Bueker is knowledgeable in the same area that Gaertner practices.

> According to Langhoff, the trial court properly denied Gaertner's motion to dismiss because the record establishes that Bueker is knowledgeable in this same area of "Architectural Design and Construction Management." **He points to the record evidence that Bueker has been a registered, practicing architect in Texas for over thirty years. He has been the architect of record on at least twenty buildings in the last fifteen years, and has provided architectural design services for at least 500 single-family homes and a multitude of commercial properties, including office, medical, retail, and banking buildings. The record reflects that he has extensive construction management and development experience as well.** Because the record reflects that he has experience and knowledge in the same area as Gaertner practices, Langhoff argues that Bueker need not establish more. We agree that the record supports the trial court's conclusion that Bueker is knowledgeable in the same area that Gaertner practices. Accordingly, the trial court did not abuse its discretion by denying Gaertner's motion to dismiss.

509 S.W.3d at 397 (emphasis added)

Texas Medical Liability Act is not applicable.

The Court should reject the Underwriters' suggestion that Texas Medical Liability Act *Tex. Civ. Prac. & Rem. Code* § 7 4.3 51 should serve as an interpreter of the COM Act. Parties dissatisfied with the wording of the COM Act have made this argument. In *Melden & Hunt, Inc. v East Rio Hondo Water Supply Corp.,* 511

S.W.3d 743 (Tex. App. - Corpus Christi-Edinburg 2015), *aff'd*, 520 S.W.3d 887 (Tex. 2017), a defendant engineer argued that the courts should look to the Texas Medical Liability Act to interpret the COM Act. The Texas Supreme Court listed in foot note 4 different cases wherein parties have argued that the Texas Medical Liability Act should act as an interpreter of the Act. There is no reference to the Texas Medical Liability Act in the COM Act and the Supreme Court did not find that the Texas Medical Liability Act should serve as an interpreter of the Act. Therefore, the court should ignore those authorities.

CONCLUSION

Judge Whatley's dismissal of the Underwriters' claims against Mayse should be affirmed. The current statute requires that the affiant practice in the area of practice of the defendant. We are not in the dark as to what this means. In *Levinson*, the Texas Supreme Court stated that in determining whether an affiant had knowledge of a defendant's practice, the record must contain information of his experience with a project like or similar to the project at issue. The same inquiry should be made with the latest statute's requirement that the affiant practice in the area of practice of the defendant. Mr. Itle's affidavit does not contain any information that demonstrates that his architectural practice includes projects like or similar to the Hotel at issue.

Dated: October 29, 2020

Richard A. Capshaw
State Bar No. 03783800
richard@capslaw.com
Stanhope B. Denegre
State Bar No. 24014734
stan@capslaw.com
CAPSHAW & ASSOCIATES
3500 Maple Avenue, Suite 1100
Dallas, Texas 75219
(214) 761.6610 (214) 761.6611 fax

Lead counsel for Defendant-Appellee Mayse & Associates, Inc.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief of Defendant-Appellee was prepared using Microsoft Word 2010, which indicated that the total word count (exclusive of those items listed in rule 9.4(i)(1) of the Texas Rules of Appellate Procedure, as amended) is 8365 words.

/s/ *Stanhope B. Denegre*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Brief of Defendant-Appellee will be served on all counsel of record on the 29th day of October 2020, via the electronic filing service used by Defendant-Appellee:

/s/ *Stanhope B. Denegre*

AIA® Document B101™ – 2007

Standard Form of Agreement Between Owner and Architect

AGREEMENT made as of the third day of February in the year two thousand fifteen
(In words, indicate day, month and year.)

BETWEEN the Architect's client identified as the Owner:
(Name, legal status, address and other information)

Momentum Hospitality, Inc.
Attn: Jatin Bhakta
3677 Hwy 35 North
Rockport, TX 78382

and the Architect:
(Name, legal status, address and other information)

Mayse & Associates, Inc.
14850 Quorum Drive
Suite 201
Dallas, TX 75254

for the following Project:
(Name, location and detailed description)

Fairfield Inn & Suites
Rockport, Texas
This project consists of an 85-room, four-story, wood-frame Marriott Fairfield Inn & Suites Hotel, which includes a lobby, administrative areas, laundry, employee break room, exercise room and breakfast room; situated on a site at the intersection of TX Hwy 35 and Fulton Avenue in Rockport, Texas.

Design shall be based on the concept design by Mayse & Associates dated 10-28-14 and the current Marriott Prototype, with modifications to enhance the overall project per Owner requirements and based on the site plan approval process.

The Owner and Architect agree as follows.

ADDITIONS AND DELETIONS:
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

Init.

TABLE OF ARTICLES

ARTICLE 1 INITIAL INFORMATION

§ 1.1 This Agreement is based on the Initial Information set forth in this Article 1 and in optional Exhibit A, Initial Information:

(Complete Exhibit A, Initial Information, and incorporate it into the Agreement at Section 13.2, or state below Initial Information such as details of the Project's site and program, Owner's contractors and consultants, Architect's consultants, Owner's budget for the Cost of the Work, authorized representatives, anticipated procurement method, and other information relevant to the Project.)

Concept site plan dated 10-28-14 as approved by the Owner.

§ 1.2 The Owner's anticipated dates for commencement of construction and Substantial Completion of the Work are set forth below:

.1 Commencement of construction date:

Late 2015

.2 Substantial Completion date:

Late 2016

§ 1.3 The Owner and Architect may rely on the Initial Information. Both parties, however, recognize that such information may materially change and, in that event, the Owner and the Architect shall appropriately adjust the schedule, the Architect's services and the Architect's compensation.

ARTICLE 2 ARCHITECT'S RESPONSIBILITIES

§ 2.1 The Architect shall provide the professional services as set forth in this Agreement.

§ 2.2 The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

§ 2.3 The Architect shall identify a representative authorized to act on behalf of the Architect with respect to the Project.

§ 2.4 Except with the Owner's knowledge and consent, the Architect shall not engage in any activity, or accept any employment, interest or contribution that would reasonably appear to compromise the Architect's professional judgment with respect to this Project.

§ 2.5 The Architect shall maintain the following insurance for the duration of this Agreement. If any of the requirements set forth below exceed the types and limits the Architect normally maintains, the Owner shall reimburse the Architect for any additional cost:
(Identify types and limits of insurance coverage, and other insurance requirements applicable to the Agreement, if any.)

.1 General Liability

$2,000,000.00

.2 Automobile Liability

$1,000,000.00

.3 Workers' Compensation

$500,000.00 per incident

.4 Professional Liability

$1,000,000.00

ARTICLE 3 SCOPE OF ARCHITECT'S BASIC SERVICES

§ 3.1 The Architect's Basic Services consist of those described in Article 3 and include usual and customary structural, mechanical, and electrical engineering services. Services not set forth in this Article 3 are Additional Services.

Refer to proposal dated on January 30, 2015 – Exhibit A

§ 3.1.1 The Architect shall manage the Architect's services, consult with the Owner, research applicable design criteria, attend Project meetings, communicate with members of the Project team and report progress to the Owner.

§ 3.1.2 The Architect shall coordinate its services with those services provided by the Owner and the Owner's consultants. The Architect shall be entitled to rely on the accuracy and completeness of services and information furnished by the Owner and the Owner's consultants. The Architect shall provide prompt written notice to the Owner if the Architect becomes aware of any error, omission or inconsistency in such services or information.

§ 3.1.3 As soon as practicable after the date of this Agreement, the Architect shall submit for the Owner's approval a schedule for the performance of the Architect's services. The schedule initially shall include anticipated dates for the commencement of construction and for Substantial Completion of the Work as set forth in the Initial Information. The schedule shall include allowances for periods of time required for the Owner's review, for the performance of the Owner's consultants, and for approval of submissions by authorities having jurisdiction over the Project. Once approved by the Owner, time limits established by the schedule shall not, except for reasonable cause, be exceeded by the Architect or Owner. With the Owner's approval, the Architect shall adjust the schedule, if necessary, as the Project proceeds until the commencement of construction.

Init.

§ 3.1.4 The Architect shall not be responsible for an Owner's directive or substitution made without the Architect's approval.

§ 3.1.5 The Architect shall, at appropriate times, contact the governmental authorities required to approve the Construction Documents and the entities providing utility services to the Project. In designing the Project, the Architect shall respond to applicable design requirements imposed by such governmental authorities and by such entities providing utility services.

§ 3.1.6 The Architect shall assist the Owner in connection with the Owner's responsibility for filing documents required for the approval of governmental authorities having jurisdiction over the Project.

§ 3.2 SCHEMATIC DESIGN PHASE SERVICES

§ 3.2.1 The Architect shall review the program and other information furnished by the Owner, and shall review laws, codes, and regulations applicable to the Architect's services.

§ 3.2.2 The Architect shall prepare a preliminary evaluation of the Owner's program (Fairfield Inn & Suite Program from Marriott), schedule, and Project site. The Architect shall notify the Owner of (1) any inconsistencies discovered in the information, and (2) other information or consulting services that may be reasonably needed for the Project.

(Paragraph deleted)

§ 3.2.4 Based on the Project's requirements agreed upon with the Owner, the Architect shall prepare and present for the Owner's approval a preliminary design illustrating the scale and relationship of the Project components.

§ 3.2.5 Based on the Owner's approval of the preliminary design, the Architect shall prepare Schematic Design Documents for the Owner's approval. The Schematic Design Documents shall consist of drawings and other documents including a site plan, if appropriate, and preliminary building plans, sections and elevations; and may include some combination of study models, perspective sketches, or digital modeling. Preliminary selections of major building systems and construction materials shall be noted on the drawings or described in writing.

§ 3.2.5.1 The Architect shall consider environmentally responsible design alternatives, such as material choices and building orientation, together with other considerations based on program and aesthetics, in developing a design that is consistent with the Owner's program and schedule. The Owner may obtain other environmentally responsible design services under Article 4.

§ 3.2.5.2 The Architect shall consider the value of alternative materials, building systems and equipment, together with other considerations based on program and aesthetics, in developing a design for the Project that is consistent with the Owner's program and schedule.

(Paragraph deleted)

§ 3.2.7 The Architect shall submit the Schematic Design Documents to the Owner, and request the Owner's approval.

§ 3.3 DESIGN DEVELOPMENT PHASE SERVICES

§ 3.3.1 Based on the Owner's approval of the Schematic Design Documents, and on the Owner's authorization of any adjustments in the Project requirements, the Architect shall prepare Design Development Documents for the Owner's approval. The Design Development Documents shall illustrate and describe the development of the approved Schematic Design Documents and shall consist of drawings and other documents including plans, sections, elevations, typical construction details, and diagrammatic layouts of building systems to fix and describe the size and character of the Project as to architectural, structural, mechanical and electrical systems, and such other elements as may be appropriate. The Design Development Documents shall also include outline specifications that identify major materials and systems and establish in general their quality levels.

(Paragraph deleted)

§ 3.3.3 The Architect shall submit the Design Development Documents to the Owner.

Init.

§ 3.4 CONSTRUCTION DOCUMENTS PHASE SERVICES

§ 3.4.1 Based on the Owner's approval of the Design Development Documents, and on the Owner's authorization of any adjustments in the Project requirements, the Architect shall prepare Construction Documents for the Owner's approval. The Construction Documents shall illustrate and describe the further development of the approved Design Development Documents and shall consist of Drawings and Specifications setting forth in detail the quality levels of materials and systems and other requirements for the construction of the Work. The Owner and Architect acknowledge that in order to construct the Work the Contractor will provide additional information, including Shop Drawings, Product Data, Samples and other similar submittals, which the Architect shall review in accordance with Section 3.6.4.

§ 3.4.2 The Architect shall incorporate into the Construction Documents the design requirements of governmental authorities having jurisdiction over the Project.

(Paragraphs deleted)

§ 3.4.5 The Architect shall submit the Construction Documents to the Owner.

(Paragraphs deleted)

§ 3.6 CONSTRUCTION PHASE SERVICES

§ 3.6.1 GENERAL

(Paragraph deleted)

§ 3.6.1.2 The Architect shall advise and consult with the Owner during the Construction Phase Services. The Architect shall have authority to act on behalf of the Owner only to the extent provided in this Agreement. The Architect shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, nor shall the Architect be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect shall be responsible for the Architect's negligent acts or omissions, but shall not have control over or charge of, and shall not be responsible for, acts or omissions of the Contractor or of any other persons or entities performing portions of the Work.

(Paragraph deleted)

§ 3.6.2 EVALUATIONS OF THE WORK

§ 3.6.2.1 The Architect shall visit the site at intervals appropriate to the stage of construction, or as otherwise required in Section 4.3.3, to become generally familiar with the progress and quality of the portion of the Work completed, and to determine, in general, if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. On the basis of the site visits, the Architect shall keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and report to the Owner (1) known deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor, and (2) defects and deficiencies observed in the Work.

§ 3.6.2.2 The Architect has the authority to reject Work that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect shall have the authority to require inspection or testing of the Work in accordance with the provisions of the Contract Documents, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees or other persons or entities performing portions of the Work.

§ 3.6.2.3 The Architect shall interpret and decide matters concerning performance under, and requirements of, the Contract Documents on written request of either the Owner or Contractor. The Architect's response to such requests shall be made in writing within any time limits agreed upon or otherwise with reasonable promptness.

§ 3.6.2.4 Interpretations and decisions of the Architect shall be consistent with the intent of and reasonably inferable from the Contract Documents and shall be in writing or in the form of drawings. When making such interpretations and decisions, the Architect shall endeavor to secure faithful performance by both Owner and Contractor, shall not show partiality to either, and shall not be liable for results of interpretations or decisions rendered in good faith. The

Init.

Architect's decisions on matters relating to aesthetic effect shall be final if consistent with the intent expressed in the Contract Documents.

§ 3.6.2.5 Unless the Owner and Contractor designate another person to serve as an Initial Decision Maker, as that term is defined in AIA Document A201–2007, the Architect shall render initial decisions on Claims between the Owner and Contractor as provided in the Contract Documents.

(Paragraphs deleted)

§ 3.6.4 SUBMITTALS

§ 3.6.4.1 The Architect shall review the Contractor's submittal schedule and shall not unreasonably delay or withhold approval. The Architect's action in reviewing submittals shall be taken in accordance with the approved submittal schedule or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time in the Architect's professional judgment to permit adequate review.

§ 3.6.4.2 In accordance with the Architect-approved submittal schedule, the Architect shall review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. Review of such submittals is not for the purpose of determining the accuracy and completeness of other information such as dimensions, quantities, and installation or performance of equipment or systems, which are the Contractor's responsibility. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

§ 3.6.4.3 If the Contract Documents specifically require the Contractor to provide professional design services or certifications by a design professional related to systems, materials or equipment, the Architect shall specify the appropriate performance and design criteria that such services must satisfy. The Architect shall review Shop Drawings and other submittals related to the Work designed or certified by the design professional retained by the Contractor that bear such professional's seal and signature when submitted to the Architect. The Architect shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications and approvals performed or provided by such design professionals.

§ 3.6.4.4 Subject to the provisions of Section 4.3, the Architect shall review and respond to requests for information about the Contract Documents. The Architect shall set forth in the Contract Documents the requirements for requests for information. Requests for information shall include, at a minimum, a detailed written statement that indicates the specific Drawings or Specifications in need of clarification and the nature of the clarification requested. The Architect's response to such requests shall be made in writing within any time limits agreed upon, or otherwise with reasonable promptness. If appropriate, the Architect shall prepare and issue supplemental Drawings and Specifications in response to requests for information.

§ 3.6.4.5 The Architect shall maintain a record of submittals and copies of submittals supplied by the Contractor in accordance with the requirements of the Contract Documents.

§ 3.6.5 CHANGES IN THE WORK

§ 3.6.5.1 The Architect may authorize minor changes in the Work that are consistent with the intent of the Contract Documents and do not involve an adjustment in the Contract Sum or an extension of the Contract Time. Subject to the provisions of Section 4.3, the Architect shall prepare Change Orders and Construction Change Directives for the Owner's approval and execution in accordance with the Contract Documents.

§ 3.6.5.2 The Architect shall maintain records relative to changes in the Work.

(Paragraphs deleted)

ARTICLE 4 ADDITIONAL SERVICES

§ 4.1 Additional Services listed below are not included in Basic Services but may be required for the Project. The Architect shall provide the listed Additional Services only if specifically designated in the table below as the Architect's responsibility, and the Owner shall compensate the Architect as provided in Section 11.2.

Init.

(Designate the Additional Services the Architect shall provide in the second column of the table below. In the third column indicate whether the service description is located in Section 4.2 or in an attached exhibit. If in an exhibit, identify the exhibit.)

Additional Services		Responsibility *(Architect, Owner or Not Provided)*	Location of Service Description *(Section 4.2 below or in an exhibit attached to this document and identified below)*
§ 4.1.1	Programming (B202™–2009)	Not Provided	
§ 4.1.2	Multiple preliminary designs	Not Provided	
§ 4.1.3	Measured drawings	Not Provided	
§ 4.1.4	Existing facilities surveys	Not Provided	
§ 4.1.5	Site Evaluation and Planning (B203™–2007)	Not Provided	
§ 4.1.6	Building Information Modeling (E202™–2008)	Not Provided	
§ 4.1.7	Civil engineering	Architect	
§ 4.1.8	Landscape design	Owner	
§ 4.1.9	Architectural Interior Design (B252™–2007)	Not Provided	
§ 4.1.10	Value Analysis (B204™–2007)	Not Provided	
§ 4.1.11	Detailed cost estimating	Owner	
§ 4.1.12	On-site Project Representation (B207™–2008)	Owner	
§ 4.1.13	Conformed construction documents	Not Provided	
§ 4.1.14	As-Designed Record drawings	Not Provided	
§ 4.1.15	As-Constructed Record drawings	Not Provided	
§ 4.1.16	Post occupancy evaluation	Not Provided	
§ 4.1.17	Facility Support Services (B210™–2007)	Not Provided	
§ 4.1.18	Tenant-related services	Not Provided	
§ 4.1.19	Coordination of Owner's consultants	Not Provided	
§ 4.1.20	Telecommunications/data design	Owner	
§ 4.1.21	Security Evaluation and Planning (B206™–2007)	Owner	
§ 4.1.22	Commissioning (B211™–2007)	Not Provided	
§ 4.1.23	Extensive environmentally responsible design	Not Provided	
§ 4.1.24	LEED® Certification (B214™–2012)	Not Provided	
§ 4.1.25	Fast-track design services	Not Provided	
§ 4.1.26	Historic Preservation (B205™–2007)	Not Provided	
§ 4.1.27	Furniture, Furnishings, and Equipment Design (B253™–2007)	Owner	

§ 4.2 Insert a description of each Additional Service designated in Section 4.1 as the Architect's responsibility, if not further described in an exhibit attached to this document.

Interior design not in project scope. Project to be prototypical Interior Design.

§ 4.3 Additional Services may be provided after execution of this Agreement, without invalidating the Agreement. Except for services required due to the fault of the Architect, any Additional Services provided in accordance with this Section 4.3 shall entitle the Architect to compensation pursuant to Section 11.3 and an appropriate adjustment in the Architect's schedule.

§ 4.3.1 Upon recognizing the need to perform the following Additional Services, the Architect shall notify the Owner with reasonable promptness and explain the facts and circumstances giving rise to the need. The Architect shall not proceed to provide the following services until the Architect receives the Owner's written authorization:

.1 Services necessitated by a change in the Initial Information, previous instructions or approvals given by the Owner, or a material change in the Project including, but not limited to, size, quality, complexity, the Owner's schedule or budget for Cost of the Work, or procurement or delivery method;

Init.

.2 Services necessitated by the Owner's request for extensive environmentally responsible design alternatives, such as unique system designs, in-depth material research, energy modeling, or LEED® certification;
.3 Changing or editing previously prepared Instruments of Service necessitated by the enactment or revision of codes, laws or regulations or official interpretations;
.4 Services necessitated by decisions of the Owner not rendered in a timely manner or any other failure of performance on the part of the Owner or the Owner's consultants or contractors;
.5 Preparing digital data for transmission to the Owner's consultants and contractors, or to other Owner authorized recipients;
.6 Preparation of design and documentation for alternate bid or proposal requests proposed by the Owner;
.7 Preparation for, and attendance at, a public presentation, meeting or hearing;
.8 Preparation for, and attendance at a dispute resolution proceeding or legal proceeding, except where the Architect is party thereto;
.9 Evaluation of the qualifications of bidders or persons providing proposals;
.10 Consultation concerning replacement of Work resulting from fire or other cause during construction; or
.11 Assistance to the Initial Decision Maker, if other than the Architect.

§ 4.3.2 To avoid delay in the Construction Phase, the Architect shall provide the following Additional Services, notify the Owner with reasonable promptness, and explain the facts and circumstances giving rise to the need. If the Owner subsequently determines that all or parts of those services are not required, the Owner shall give prompt written notice to the Architect, and the Owner shall have no further obligation to compensate the Architect for those services:

.1 Reviewing a Contractor's submittal out of sequence from the submittal schedule agreed to by the Architect;
.2 Responding to the Contractor's requests for information that are not prepared in accordance with the Contract Documents or where such information is available to the Contractor from a careful study and comparison of the Contract Documents, field conditions, other Owner-provided information, Contractor-prepared coordination drawings, or prior Project correspondence or documentation;
.3 Preparing Change Orders and Construction Change Directives that require evaluation of Contractor's proposals and supporting data, or the preparation or revision of Instruments of Service;
.4 Evaluating an extensive number of Claims as the Initial Decision Maker;
.5 Evaluating substitutions proposed by the Owner or Contractor and making subsequent revisions to Instruments of Service resulting therefrom; or
.6 To the extent the Architect's Basic Services are affected, providing Construction Phase Services 60 days after (1) the date of Substantial Completion of the Work or (2) the anticipated date of Substantial Completion identified in Initial Information, whichever is earlier.

§ 4.3.3 The Architect shall provide Construction Phase Services exceeding the limits set forth below as Additional Services. When the limits below are reached, the Architect shall notify the Owner:

.1 Up to two (2) reviews of each Shop Drawing, Product Data item, sample and similar submittal of the Contractor
.2 Five (5) visits to the site by the Architect over the duration of the Project during construction
.3 Zero (0) inspections for any portion of the Work to determine whether such portion of the Work is substantially complete in accordance with the requirements of the Contract Documents
.4 Zero (0) inspections for any portion of the Work to determine final completion
.5 Two (2) site visits by Structural Engineer Firm.

§ 4.3.4 If the services covered by this Agreement have not been completed within twenty-four (24) months of the date of this Agreement, through no fault of the Architect, extension of the Architect's services beyond that time shall be compensated as Additional Services.

ARTICLE 5 OWNER'S RESPONSIBILITIES

§ 5.1 Unless otherwise provided for under this Agreement, the Owner shall provide information in a timely manner regarding requirements for and limitations on the Project, including a written program which shall set forth the Owner's objectives, schedule, constraints and criteria, including space requirements and relationships, flexibility, expandability, special equipment, systems and site requirements. Within 15 days after receipt of a written request from the Architect, the Owner shall furnish the requested information as necessary and relevant for the Architect to evaluate, give notice of or enforce lien rights.

Init.

(Paragraph deleted)

§ 5.3 The Owner shall identify a representative authorized to act on the Owner's behalf with respect to the Project. The Owner shall render decisions and approve the Architect's submittals in a timely manner in order to avoid unreasonable delay in the orderly and sequential progress of the Architect's services.

§ 5.4 The Owner shall furnish surveys to describe physical characteristics, legal limitations and utility locations for the site of the Project, and a written legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; designated wetlands; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data with respect to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All the information on the survey shall be referenced to a Project benchmark.

§ 5.5 The Owner shall furnish services of geotechnical engineers, which may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, seismic evaluation, ground corrosion tests and resistivity tests, including necessary operations for anticipating subsoil conditions, with written reports and appropriate recommendations.

§ 5.6 The Owner shall coordinate the services of its own consultants with those services provided by the Architect. Upon the Architect's request, the Owner shall furnish copies of the scope of services in the contracts between the Owner and the Owner's consultants. The Owner shall furnish the services of consultants other than those designated in this Agreement, or authorize the Architect to furnish them as an Additional Service, when the Architect requests such services and demonstrates that they are reasonably required by the scope of the Project. The Owner shall require that its consultants maintain professional liability insurance as appropriate to the services provided.

§ 5.7 The Owner shall furnish tests, inspections and reports required by law or the Contract Documents, such as structural, mechanical, and chemical tests, tests for air and water pollution, and tests for hazardous materials.

§ 5.8 The Owner shall furnish all legal, insurance and accounting services, including auditing services, that may be reasonably necessary at any time for the Project to meet the Owner's needs and interests.

§ 5.9 The Owner shall provide prompt written notice to the Architect if the Owner becomes aware of any fault or defect in the Project, including errors, omissions or inconsistencies in the Architect's Instruments of Service.

§ 5.10 Except as otherwise provided in this Agreement, or when direct communications have been specially authorized, the Owner shall endeavor to communicate with the Contractor and the Architect's consultants through the Architect about matters arising out of or relating to the Contract Documents. The Owner shall promptly notify the Architect of any direct communications that may affect the Architect's services.

(Paragraph deleted)

§ 5.12 The Owner shall provide the Architect access to the Project site prior to commencement of the Work and shall obligate the Contractor to provide the Architect access to the Work wherever it is in preparation or progress.

(Paragraphs deleted)

ARTICLE 7 COPYRIGHTS AND LICENSES

§ 7.1 The Architect and the Owner warrant that in transmitting Instruments of Service, or any other information, the transmitting party is the copyright owner of such information or has permission from the copyright owner to transmit such information for its use on the Project. If the Owner and Architect intend to transmit Instruments of Service or any other information or documentation in digital form, they shall endeavor to establish necessary protocols governing such transmissions.

§ 7.2 The Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and shall retain all common law, statutory and other reserved rights, including copyrights. Submission or distribution of Instruments of Service to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of the reserved rights of the Architect and the Architect's consultants.

§ 7.3 Upon execution of this Agreement, the Architect grants to the Owner a nonexclusive license to use the Architect's Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the Owner substantially performs its obligations, including prompt payment of all sums when due, under this Agreement. The Architect shall obtain similar nonexclusive licenses from the Architect's consultants consistent with this Agreement. The license granted under this section permits the Owner to authorize the Contractor, Subcontractors, Sub-subcontractors, and material or equipment suppliers, as well as the Owner's consultants and separate contractors, to reproduce applicable portions of the Instruments of Service solely and exclusively for use in performing services or construction for the Project. If the Architect rightfully terminates this Agreement for cause as provided in Section 9.4, the license granted in this Section 7.3 shall terminate.

§ 7.3.1 In the event the Owner uses the Instruments of Service without retaining the author of the Instruments of Service, the Owner releases the Architect and Architect's consultant(s) from all claims and causes of action arising from such uses. The Owner, to the extent permitted by law, further agrees to indemnify and hold harmless the Architect and its consultants from all costs and expenses, including the cost of defense, related to claims and causes of action asserted by any third person or entity to the extent such costs and expenses arise from the Owner's use of the Instruments of Service under this Section 7.3.1. The terms of this Section 7.3.1 shall not apply if the Owner rightfully terminates this Agreement for cause under Section 9.4.

§ 7.4 Except for the licenses granted in this Article 7, no other license or right shall be deemed granted or implied under this Agreement. The Owner shall not assign, delegate, sublicense, pledge or otherwise transfer any license granted herein to another party without the prior written agreement of the Architect. Any unauthorized use of the Instruments of Service shall be at the Owner's sole risk and without liability to the Architect and the Architect's consultants.

ARTICLE 8 CLAIMS AND DISPUTES

§ 8.1 GENERAL

§ 8.1.1 The Owner and Architect shall commence all claims and causes of action, whether in contract, tort, or otherwise, against the other arising out of or related to this Agreement in accordance with the requirements of the method of binding dispute resolution selected in this Agreement within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Architect waive all claims and causes of action not commenced in accordance with this Section 8.1.1.

§ 8.1.2 To the extent damages are covered by property insurance, the Owner and Architect waive all rights against each other and against the contractors, consultants, agents and employees of the other for damages, except such rights as they may have to the proceeds of such insurance as set forth in AIA Document A201–2007, General Conditions of the Contract for Construction. The Owner or the Architect, as appropriate, shall require of the contractors, consultants, agents and employees of any of them similar waivers in favor of the other parties enumerated herein.

§ 8.1.3 The Architect and Owner waive consequential damages for claims, disputes or other matters in question arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination of this Agreement, except as specifically provided in Section 9.7.

§ 8.2 MEDIATION

§ 8.2.1 Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to binding dispute resolution. If such matter relates to or is the subject of a lien arising out of the Architect's services, the Architect may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the matter by mediation or by binding dispute resolution.

§ 8.2.2 The Owner and Architect shall endeavor to resolve claims, disputes and other matters in question between them by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to the Agreement, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of a complaint or other appropriate demand for binding dispute resolution but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration

Init.

proceeding is stayed pursuant to this section, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.

§ 8.2.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

§ 8.2.4 If the parties do not resolve a dispute through mediation pursuant to this Section 8.2, the method of binding dispute resolution shall be the following:
(Check the appropriate box. If the Owner and Architect do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, the dispute will be resolved in a court of competent jurisdiction.)

[ ] Arbitration pursuant to Section 8.3 of this Agreement

[ ] Litigation in a court of competent jurisdiction

[ ] Other (Specify)

§ 8.3 ARBITRATION

§ 8.3.1 If the parties have selected arbitration as the method for binding dispute resolution in this Agreement, any claim, dispute or other matter in question arising out of or related to this Agreement subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of this Agreement. A demand for arbitration shall be made in writing, delivered to the other party to this Agreement, and filed with the person or entity administering the arbitration.

§ 8.3.1.1 A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation, but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the claim, dispute or other matter in question would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the claim, dispute or other matter in question.

§ 8.3.2 The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to this Agreement shall be specifically enforceable in accordance with applicable law in any court having jurisdiction thereof.

§ 8.3.3 The award rendered by the arbitrator(s) shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

§ 8.3.4 CONSOLIDATION OR JOINDER

§ 8.3.4.1 Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation; (2) the arbitrations to be consolidated substantially involve common questions of law or fact; and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

§ 8.3.4.2 Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.

§ 8.3.4.3 The Owner and Architect grant to any person or entity made a party to an arbitration conducted under this Section 8.3, whether by joinder or consolidation, the same rights of joinder and consolidation as the Owner and Architect under this Agreement.

ARTICLE 9 TERMINATION OR SUSPENSION

§ 9.1 If the Owner fails to make payments to the Architect in accordance with this Agreement, such failure shall be considered substantial nonperformance and cause for termination or, at the Architect's option, cause for suspension of performance of services under this Agreement. If the Architect elects to suspend services, the Architect shall give seven days' written notice to the Owner before suspending services. In the event of a suspension of services, the Architect shall have no liability to the Owner for delay or damage caused the Owner because of such suspension of services. Before resuming services, the Architect shall be paid all sums due prior to suspension and any expenses incurred in the interruption and resumption of the Architect's services. The Architect's fees for the remaining services and the time schedules shall be equitably adjusted.

§ 9.2 If the Owner suspends the Project, the Architect shall be compensated for services performed prior to notice of such suspension. When the Project is resumed, the Architect shall be compensated for expenses incurred in the interruption and resumption of the Architect's services. The Architect's fees for the remaining services and the time schedules shall be equitably adjusted.

§ 9.3 If the Owner suspends the Project for more than 90 cumulative days for reasons other than the fault of the Architect, the Architect may terminate this Agreement by giving not less than seven days' written notice.

§ 9.4 Either party may terminate this Agreement upon not less than seven days' written notice should the other party fail substantially to perform in accordance with the terms of this Agreement through no fault of the party initiating the termination.

§ 9.5 The Owner may terminate this Agreement upon not less than seven days' written notice to the Architect for the Owner's convenience and without cause.

§ 9.6 In the event of termination not the fault of the Architect, the Architect shall be compensated for services performed prior to termination, together with Reimbursable Expenses then due and all Termination Expenses as defined in Section 9.7.

§ 9.7 Termination Expenses are in addition to compensation for the Architect's services and include expenses directly attributable to termination for which the Architect is not otherwise compensated, plus an amount for the Architect's anticipated profit on the value of the services not performed by the Architect.

§ 9.8 The Owner's rights to use the Architect's Instruments of Service in the event of a termination of this Agreement are set forth in Article 7 and Section 11.9.

ARTICLE 10 MISCELLANEOUS PROVISIONS

§ 10.1 This Agreement shall be governed by the law of the place where the Project is located, except that if the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 8.3.

§ 10.2 Terms in this Agreement shall have the same meaning as those in AIA Document A201–2007, General Conditions of the Contract for Construction.

§ 10.3 The Owner and Architect, respectively, bind themselves, their agents, successors, assigns and legal representatives to this Agreement. Neither the Owner nor the Architect shall assign this Agreement without the written consent of the other, except that the Owner may assign this Agreement to a lender providing financing for the Project if the lender agrees to assume the Owner's rights and obligations under this Agreement.

§ 10.4 If the Owner requests the Architect to execute certificates, the proposed language of such certificates shall be submitted to the Architect for review at least 14 days prior to the requested dates of execution. If the Owner requests the Architect to execute consents reasonably required to facilitate assignment to a lender, the Architect shall execute all such consents that are consistent with this Agreement, provided the proposed consent is submitted to the Architect for review at least 14 days prior to execution. The Architect shall not be required to execute certificates or consents that would require knowledge, services or responsibilities beyond the scope of this Agreement.

Init.

§ 10.5 Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner or Architect.

§ 10.6 Unless otherwise required in this Agreement, the Architect shall have no responsibility for the discovery, presence, handling, removal or disposal of, or exposure of persons to, hazardous materials or toxic substances in any form at the Project site.

§ 10.7 The Architect shall have the right to include photographic or artistic representations of the design of the Project among the Architect's promotional and professional materials. The Architect shall be given reasonable access to the completed Project to make such representations. However, the Architect's materials shall not include the Owner's confidential or proprietary information if the Owner has previously advised the Architect in writing of the specific information considered by the Owner to be confidential or proprietary. The Owner shall provide professional credit for the Architect in the Owner's promotional materials for the Project.

§ 10.8 If the Architect or Owner receives information specifically designated by the other party as "confidential" or "business proprietary," the receiving party shall keep such information strictly confidential and shall not disclose it to any other person except to (1) its employees, (2) those who need to know the content of such information in order to perform services or construction solely and exclusively for the Project, or (3) its consultants and contractors whose contracts include similar restrictions on the use of confidential information.

ARTICLE 11 COMPENSATION

§ 11.1 For the Architect's Basic Services described under Article 3, the Owner shall compensate the Architect as follows:
(Insert amount of, or basis for, compensation.)

[redacted] as outlined in proposal dated January 30, 2015.

§ 11.2 For Additional Services designated in Section 4.1, the Owner shall compensate the Architect as follows:
(Insert amount of, or basis for, compensation. If necessary, list specific services to which particular methods of compensation apply.)

Refer to proposal dated January 30, 2015 – Exhibit A

§ 11.3 For Additional Services that may arise during the course of the Project, including those under Section 4.3, the Owner shall compensate the Architect as follows:
(Insert amount of, or basis for, compensation.)

See hourly rates as outlined in proposal dated January 30, 2015 – Exhibit A

§ 11.4 Compensation for Additional Services of the Architect's consultants when not included in Section 11.2 or 11.3, shall be the amount invoiced to the Architect plus fifteen percent (15 %), or as otherwise stated below:

§ 11.5 Where compensation for Basic Services is based on a stipulated sum or percentage of the Cost of the Work, the compensation for each phase of services shall be as follows:

Schematic Design Phase	Ten	percent (	10	%)
Design Development Phase	Ten	percent (	10	%)
Construction Documents Phase	Seventy	percent (	70	%)
Bidding or Negotiation Phase	Zero	percent (	0	%)
Construction Phase	Ten	percent (	10	%)
Total Basic Compensation	one hundred	percent (	100	%)

Init.

§ 11.6 When compensation is based on a percentage of the Cost of the Work and any portions of the Project are deleted or otherwise not constructed, compensation for those portions of the Project shall be payable to the extent services are performed on those portions, in accordance with the schedule set forth in Section 11.5 based on (1) the lowest bona fide bid or negotiated proposal, or (2) if no such bid or proposal is received, the most recent estimate of the Cost of the Work for such portions of the Project. The Architect shall be entitled to compensation in accordance with this Agreement for all services performed whether or not the Construction Phase is commenced.

§ 11.7 The hourly billing rates for services of the Architect and the Architect's consultants, if any, are set forth below. The rates shall be adjusted in accordance with the Architect's and Architect's consultants' normal review practices. *(If applicable, attach an exhibit of hourly billing rates or insert them below.)*

Refer to proposal dated January 30, 2015 – Exhibit A

Employee or Category	Rate

§ 11.8 COMPENSATION FOR REIMBURSABLE EXPENSES

§ 11.8.1 Reimbursable Expenses are in addition to compensation for Basic and Additional Services and include expenses incurred by the Architect and the Architect's consultants directly related to the Project, as follows:

.1 Transportation and authorized out-of-town travel and subsistence;
.2 Long distance services, dedicated data and communication services, teleconferences, Project Web sites, and extranets;
.3 Fees paid for securing approval of authorities having jurisdiction over the Project;
.4 Printing, reproductions, plots, standard form documents;
.5 Postage, handling and delivery;
.6 Expense of overtime work requiring higher than regular rates, if authorized in advance by the Owner;
.7 Renderings, models, mock-ups, professional photography, and presentation materials requested by the Owner;
.8 Architect's Consultant's expense of professional liability insurance dedicated exclusively to this Project, or the expense of additional insurance coverage or limits if the Owner requests such insurance in excess of that normally carried by the Architect's consultants;
.9 All taxes levied on professional services and on reimbursable expenses;
.10 Site office expenses; and
.11 Other similar Project-related expenditures.

§ 11.8.2 For Reimbursable Expenses the compensation shall be the expenses incurred by the Architect and the Architect's consultants plus fifteen percent (15 %) of the expenses incurred.

§ 11.9 COMPENSATION FOR USE OF ARCHITECT'S INSTRUMENTS OF SERVICE

If the Owner terminates the Architect for its convenience under Section 9.5, or the Architect terminates this Agreement under Section 9.3, the Owner shall pay a licensing fee as compensation for the Owner's continued use of the Architect's Instruments of Service solely for purposes of completing, using and maintaining the Project as follows:

The percent of fee due is based on percent of work complete plus $15,000.00

§ 11.10 PAYMENTS TO THE ARCHITECT

§ 11.10.1 An initial payment of 5% ($ 9,633.75) shall be made upon execution of this Agreement and is the minimum payment under this Agreement. It shall be credited to the Owner's account in the final invoice.

§ 11.10.2 Unless otherwise agreed, payments for services shall be made monthly in proportion to services performed. Payments are due and payable upon presentation of the Architect's invoice. Amounts unpaid thirty (30) days after the invoice date shall bear interest at the rate entered below, or in the absence thereof at the legal rate prevailing from time to time at the principal place of business of the Architect.
(Insert rate of monthly or annual interest agreed upon.)

1 % monthly

Init.

§ 11.10.3 The Owner shall not withhold amounts from the Architect's compensation to impose a penalty or liquidated damages on the Architect, or to offset sums requested by or paid to contractors for the cost of changes in the Work unless the Architect agrees or has been found liable for the amounts in a binding dispute resolution proceeding.

§ 11.10.4 Records of Reimbursable Expenses, expenses pertaining to Additional Services, and services performed on the basis of hourly rates shall be available to the Owner at mutually convenient times.

ARTICLE 12 SPECIAL TERMS AND CONDITIONS

Special terms and conditions that modify this Agreement are as follows:

See scope as outlined in the proposal dated January 30, 2015. Fee is based on the project to be negotiated with a general contractor and not bid out to several general contractors. The architect shall not prepare any cost of work budgets or projections that is to be the owner and GC responsibility. Any Zoning, Planned Development, or other permits other than Building permit will be Add Service in addition to this contract.

ARTICLE 13 SCOPE OF THE AGREEMENT

§ 13.1 This Agreement represents the entire and integrated agreement between the Owner and the Architect and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and Architect.

§ 13.2 This Agreement is comprised of the following documents listed below:

.1 AIA Document B101™–2007, Standard Form Agreement Between Owner and Architect

.3 Other documents:
(List other documents, if any, including Exhibit A, Initial Information, and additional scopes of service, if any, forming part of the Agreement.)

See attached proposal dated January 30, 2015 – Exhibit A

This Agreement entered into as of the day and year first written above.

OWNER	ARCHITECT
(Signature)	*(Signature)*
Jatin Bhakta President	Mike Mayse President
(Printed name and title)	*(Printed name and title)*

KeyCite Yellow Flag - Negative Treatment
Distinguished by Melden & Hunt, Inc. v. East Rio Hondo Water Supply Corporation, Tex., June 9, 2017

513 S.W.3d 487
Supreme Court of Texas.

LEVINSON ALCOSER ASSOCIATES, L.P. and Levinson Associates, Inc., Petitioners,
v.
EL PISTOLÓN II, LTD., Respondent

No. 15–0232
|
Argued November 7, 2016
|
Opinion delivered: February 24, 2017
|
Rehearing Overruled April 21, 2017

Synopsis
Background: Land owner brought action against architects for breach of contract and negligence. The 370th District Court, Hidalgo County, Noe Gonzalez, J., denied architects' motion to dismiss that was based on an inadequate certificate of merit. Architects filed an interlocutory appeal. The Corpus Christi-Edinburg Court of Appeals, 500 S.W.3d 431, affirmed in part and reversed in part. Architects appealed.

Holdings: The Supreme Court, John P. Devine, J., held that:

[1] sufficient inconsistency between appellate court decisions provided Supreme Court with jurisdiction;

[2] purported expert was not shown to be qualified to render certificate of merit; and

[3] knowledge requirement to render a certificate of merit is not synonymous with the licensure or active engagement requirements.

Judgment of the Court of Appeals reversed and remanded.

Brown, J., filed concurring opinion.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (10)

[1] **Courts** Review by or certificate to Supreme Court by Court of Civil Appeals of questions where its decision conflicts with or overrules that of another Court of Civil Appeals or that of the Supreme Court

Sufficient inconsistency between appellate court decisions provided Supreme Court with jurisdiction over appeal from trial court's denial of architects' motion to dismiss negligence action that was based on inadequate of certificate of merit; Court of Appeals concluded, unlike a prior opinion, that averment or other evidence regarding expert's familiarity with, or knowledge of, practice area at issue was unnecessary to provide adequate certificate of merit. Tex. Civ. Prac. & Rem. Code Ann. § 150.002(f); Tex. Gov't Code Ann. § 22.225(e).

2 Cases that cite this headnote

[2] **Negligence** Affidavit or certification of expert

Purported expert did not show himself to be knowledgeable in area of architects' practice, and therefore expert was not shown to be qualified to render certificate of merit, mandating dismissal of land owner's negligence action against architects; nothing existed in expert's affidavit or in other record sources from which to draw inference that he possessed knowledge of architects' area of practice beyond generalized knowledge associated with holding same license. Tex. Civ. Prac. & Rem. Code Ann. § 150.002(a)(3), (e).

3 Cases that cite this headnote

[3] **Appeal and Error** Opinion evidence and hypothetical questions

Architects preserved for appeal their argument that affidavit did not demonstrate that purported expert had requisite knowledge to provide certificate of merit in support of land owner's negligence action, where architects questioned expert's knowledge of their area of practice both in written pleadings before hearing and again at hearing on architect's motion to dismiss. Tex. Civ. Prac. & Rem. Code Ann. § 150.002(a)(3).

1 Cases that cite this headnote

[4] **Appeal and Error** Statutory or legislative law

Matters of statutory construction are reviewed de novo.

5 Cases that cite this headnote

[5] **Statutes** Language and intent, will, purpose, or policy

In construing statutes, the objective is to give effect to the Legislature's intent that is gleaned from the text, when possible.

[6] **Statutes** Language

In divining the Legislature's intent, courts presume the Legislature chose statutory language deliberately and purposefully.

2 Cases that cite this headnote

[7] **Statutes** Statute as a Whole; Relation of Parts to Whole and to One Another

In construing statutes, courts endeavor to interpret each word, phrase, and clause in a manner that gives meaning to them all.

4 Cases that cite this headnote

[8] **Statutes** Superfluousness

Courts read statutes as a whole so as to render no part inconsistent, superfluous, or devoid of meaning.

4 Cases that cite this headnote

[9] **Negligence** Affidavit or certification of expert

The statutory requirement that an expert providing a certificate of merit in an action against an architect be knowledgeable in the area of practice of the defendant is not synonymous with the expert's licensure or active engagement in the practice; the knowledge factor requires some additional explication or evidence reflecting the expert's familiarity or experience with the practice area at issue in the litigation. Tex. Civ. Prac. & Rem. Code Ann. § 150.002(a)(2, 3), (b).

2 Cases that cite this headnote

[10] **Negligence** Affidavit or certification of expert

An expert's knowledge, as required to be qualified to provide a certificate of merit in an action against an architect, may be inferred from record sources other than the expert's affidavit. Tex. Civ. Prac. & Rem. Code Ann. § 150.002(a)(3).

1 Cases that cite this headnote

***489** ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS, Rogelio Valdez, J.

Attorneys and Law Firms

Boris A. Hidalgo, Thompson & Knight LLP, Houston TX, Edmundo O. Ramirez, Ellis Koeneke & Ramirez, L.L.P., McAllen TX, Richard B. Phillips, Jr., Thompson & Knight LLP, Dallas TX, for Petitioners.

Charles Randall 'Chad' Flores, Parth S. Gejji, Russell S. Post, Beck Redden, LLP, Cory D. Itkin, Jason A. Itkin, Micajah Daniel Boatright, Noah Michael Wexler, Arnold & Itkin, LLP, Houston TX, Gilberto Hinojosa, Law Offices of Gilberto Hinojosa & Associates, P.C., Brownsville TX, for Respondent.

Justice Devine delivered the opinion of the Court, in which Chief Justice Hecht, Justice Green, Justice Johnson, Justice Willett, Justice Guzman, Justice Lehrmann, and Justice Boyd joined.

Opinion

John P. Devine, Justice

This is an interlocutory appeal from an order denying a motion to dismiss under Chapter 150 of the Civil Practice and Remedies Code, the statute that applies to suits against architects, engineers, surveyors, and landscape architects. TEX. CIV. PRAC. & REM. CODE § 150.001(1–a). The chapter generally requires that a sworn "certificate of merit" accompany a plaintiff's complaint in any case "arising out of the provision of professional services by a licensed or registered professional" named in the statute. *Id.* § 150.002(a). The certificate or affidavit must be from a similarly licensed professional, who meets certain qualifications and attests to the merit of the underlying claim. *Id.* § 150.002(a), (b). If the plaintiff fails to file a compliant certificate of merit, the statute directs dismissal of the complaint. *Id.* § 150.002(e).

A certificate of merit was filed with the complaint in this case, but the defendant architects contend that it failed to comply with the statute's requirements and was thus a nullity. The court of appeals disagreed. It concluded, as did the trial court, that the certificate was sufficient for the plaintiff's negligence claim to proceed. 500 S.W.3d 431, 436 (Tex. App.–Corpus Christi–Edinburg 2015). Because neither the affidavit nor record here confirms that the affiant possessed the requisite knowledge to issue the certificate of merit, we reverse.

I

The lawsuit concerns a commercial retail project constructed on land owned by El Pistolón II, Ltd. in McAllen, Texas. El Pistolón hired Levinson Alcoser Associates, L.P. and Levinson Associates, Inc. (the "architects") to design the project and oversee construction. Disappointed with the architects' services, El Pistolón sued, alleging breach of contract and negligence in the project's design and development. Gary Payne, a third-party licensed architect, provided El Pistolón an affidavit stating his professional opinion about the architects' work. El Pistolón filed Payne's affidavit with its original petition.

The architects nevertheless moved to dismiss El Pistolón's suit, objecting that Payne's affidavit did not meet the requirements for a certificate of merit. The certificate-of-merit statute provides, among other things, that the affiant should be "knowledgeable in the (defendant's) area of practice" and that the affidavit should set forth the professional's negligence or other wrongdoing and its "factual basis." TEX. CIV. PRAC. & REM. CODE § 150.002(a)–(b). The architects complained in the trial court that Payne's affidavit satisfied neither ***490** the statute's knowledge or factual-basis requirements. The trial court denied the motion to dismiss, and the architects appealed. *See id.* § 150.002(f) (authorizing interlocutory appeals).

The court of appeals affirmed the trial court's order in part, reversed it in part, and remanded the case to the trial court. 500 S.W.3d at 438. The court affirmed the order denying dismissal of El Pistolón's negligence claim, concluding that Payne's affidavit satisfied both the statute's knowledge and factual-basis requirements as to that claim. *Id.* at 436–38. But the court reversed the order as to the contract claim, concluding that Payne's affidavit was deficient as to that claim. *Id.* at 438. The appellate court then remanded for the trial court to determine whether the contract claim should be dismissed with or without prejudice. *See id.* (citing TEX. CIV. PRAC. & REM. CODE § 150.002(e), providing that the dismissal for failure to file a compliant certificate of merit may be with prejudice). The court of appeals' decision was accordingly adverse to both parties in part. The architects have appealed that decision; El Pistolón has not. Thus, this appeal does not concern the contract claim.

The question here is whether Payne's affidavit was sufficient under the statute to support El Pistolón's negligence claim.

II

[1]But before we consider that question, there is the matter of our own jurisdiction over the appeal. The statute provides for an interlocutory appeal, TEX. CIV. PRAC. & REM. CODE § 150.002(f), but our jurisdiction does not ordinarily extend to such appeals. TEX. GOV'T CODE § 22.225(b)(3). Exceptions exist, however. For example, we have jurisdiction over an interlocutory appeal when the appellate decision under review conflicts with a prior case, that is, when "the court[ ] of appeals holds differently from a prior decision of another court of appeals or of the supreme court." *Id.* § 22.225(c). Moreover, the Legislature has determined that a sufficient conflict exists for purposes of our jurisdiction "when there is inconsistency in [the] respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants." *Id.* § 22.225 (e); *see* *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 58 n.12 (Tex. 2016) (noting that the Legislature rejected the Court's previously more restricted view of "conflicts jurisdiction" by adding this definition in 2003).

The architects argue that such a conflict exists with *Dunham Engineering, Inc. v. Sherwin–Williams Co.*, 404 S.W.3d 785 (Tex. App.–Houston [14th Dist.] 2013, no pet.). In that case, a municipality hired Dunham to design and produce engineering plans and specifications for a public works project. *Id.* at 788. Dunham's plans specified that paint products from a particular company should be used. *Id.* Sherwin–Williams requested that its products also be specified for use on the project, but Dunham refused because it considered them to be inferior. *Id.* Sherwin–Williams thereafter sued Dunham, alleging counts of intentional interference with prospective business relationships, business disparagement, and product disparagement, attaching to its original petition an affidavit from James O'Connor, a licensed professional civil engineer and engineering professor at the University of Texas at Austin. *Id.*

In his affidavit, O'Connor stated that he was familiar with the legal requirements and industry customs regarding competitive bidding on Texas public works projects. *Id.* Based on his review of Dunham's plan specifications, O'Connor concluded that the project required competitive bidding but that Dunham's specification on paint products was a closed or sole-source ***491** specification. *Id.* He further concluded that Dunham's paint specification violated both Dunham's duty under the Texas Board of Professional Engineers' rules and Texas law by not allowing for open competition. *Id.*

Dunham moved to dismiss the suit on the ground that O'Connor had failed to demonstrate his knowledge of Dunham's practice area. *Id.* at 789. The court of appeals disagreed, concluding that the trial court had not abused its discretion in denying Dunham's motion to dismiss on this ground. *Id.* at 795. O'Connor's affidavit indicated that he held a Ph.D. in civil engineering, was licensed by the State of Texas as a professional engineer with the designation of "civil," and currently served as a professor in project management within the civil, architectural, and environmental engineering department at the University of Texas. *Id.* O'Connor further averred that he was familiar with both the legal requirements and industry customs regarding competitive bidding on public works projects, particularly in the State of Texas, through his practice, research, and teaching in the state. *Id.* On this record, the appellate court concluded the trial court could have reasonably inferred that O'Connor was knowledgeable in the relevant area of practice, as required by section 150.002(a)(3). *Id.*

In contrast, the court of appeals here concluded that the requisite knowledge could be inferred simply from the expert's status as a similarly licensed professional because "the statute merely requires that the expert be knowledgeable in the defendant's general area of practice." 500 S.W.3d at 436. Unlike *Dunham*, the court found an averment or other evidence regarding the expert's familiarity with, or knowledge of, the practice area at issue unnecessary. This inconsistency is sufficient for our jurisdictional purposes. *See* TEX. GOV'T CODE § 22.225(e). We turn then to the conditions and requirements the statute imposes on suits against certain design professionals such as the architects in this case.

III

The statute provides that a sworn certificate of merit must accompany the plaintiff's complaint in any case "arising out of the provision of professional services by a licensed or registered professional" named in the statute. TEX. CIV. PRAC. & REM. CODE § 150.002(a). The sworn certificate or affidavit must be by a similarly licensed or registered professional capable of attesting to any professional errors or omissions forming the basis of the suit. *Id.* The statute describes the affiant's qualifications and what the affidavit should include. *Id.* § 150.002(a)–(b). The affidavit is generally a prerequisite to the suit going forward, and the failure to file it contemporaneously with the complaint will ordinarily result in dismissal. *See id.* § 150.002(a), (e); *but see id.* § 150.002(c).

[2]The architects contend that the lower courts erred in not dismissing El Pistolón's negligence claim because Payne's affidavit did not meet the requirements for a certificate of merit. They argue the affidavit was insufficient because (1) Payne was not properly qualified under the statute to give a professional opinion and (2) his professional opinion failed to supply the "factual basis" for the underlying claims as the statute requires. *See id.* § 150.002(a)–(b). We turn to the issue of Payne's qualifications because it is dispositive of the appeal.

The statute identifies those who are qualified to render a certificate of merit. It provides that the sworn certificate or affidavit must come from a third-party professional who:

> (1) is competent to testify;
>
> ***492** (2) holds the same professional license or registration as the defendant; and
>
> (3) *is knowledgeable in the area of practice of the defendant* and offers testimony based on the person's:
>
> (A) knowledge;
>
> (B) skill;
>
> (C) experience;
>
> (D) education;
>
> (E) training; and
>
> (F) practice.

Id. § 150.002(a)(emphasis added). The statute also provides that the third-party expert must be "licensed or registered in this state and actively engaged in the practice of architecture, engineering, or surveying." *Id.* § 150.002(b). The certificate of merit must thus come from a competent third-party expert who meets the statutory qualifications, which are that the expert (1) hold the same professional license or registration as the defendant, (2) be licensed or registered in this state, (3) be actively engaged in the practice, and (4) be knowledgeable in the defendant's area of practice. *Id.* § 150.002(a)–(b).

Payne's affidavit includes the following information about his competency and qualifications:

> 1. My name is Gary Payne. I am a professional architect who is registered to practice in the State of Texas, license number 11655. I have been a registered architect in Texas since 1980, and have an active architecture practice in the State of Texas today.
>
> 2. I am over the age of eighteen years, have never been convicted of a felony or crime of moral turpitude, and am otherwise competent to make this affidavit. I have personal knowledge of the facts contained in this affidavit. Those facts are true and correct.

While the affidavit provides some of the relevant information, the architects point out that it does not provide any information about Payne's knowledge of their area of practice as section 150.002(a)(3) requires.

[3]El Pistolón responds that Payne's affidavit demonstrates the requisite knowledge, but that the architects waived the complaint in any event by failing properly to raise it in the trial court. The court of appeals did not agree. 500 S.W.3d at 434. The court observed that the architects questioned Payne's knowledge of their area of practice both in written pleadings before the hearing and again at the hearing on the motion to dismiss where defense counsel "argued that Payne failed to state that he is knowledgeable in Levinson's area of practice." *Id.* We agree with the court of appeals that the issue of Payne's knowledge of the architects' area of practice was presented to the trial court and preserved for review.

After urging waiver, El Pistolón next argues about what the certificate of merit did not need to include. For example, El Pistolón submits that Payne did not have to be engaged in the same area of practice as the defendants to be qualified to give his opinion. Although the certificate-of-merit statute at one time provided that the expert had to be "competent to testify and *practicing in the same area of practice as the defendant*," the highlighted language was amended in 2009 to provide that the expert was instead to be "knowledgeable in the

area of practice of the defendant." *Compare* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 20.01, 2003 Tex. Gen. Laws 847, 896–97 (emphasis added) *with* Act of June 19, 2009, 81st Leg., R.S., ch. 789, § 3, 2009 Tex. Gen Laws 1991, 1992 (codified at TEX. CIV. PRAC. & REM. CODE § 150.002(a)(3)). Because the 2009 version of the statute applies in this case, we agree that the third-party expert did not have to be actively engaged in the practice area at ***493** issue to be knowledgeable and qualified to render an opinion under the statute.

El Pistolón next argues that the expert's knowledge of the practice area does not have to be expressed in the affidavit itself but may be inferred from other record sources. El Pistolón submits that the majority of Texas courts to consider the question have concluded that "while the affiant must be knowledgeable in the area of practice of the defendant, he need not explicitly establish such knowledge on the face of the certificate of merit." *CBM Eng'rs, Inc. v. Tellepsen Builders, L.P.*, 403 S.W.3d 339, 345 (Tex. App.–Houston [1st Dist.] 2013, pet. denied); *accord* *Dunham Eng'g, Inc.*, 404 S.W.3d at 794–95; *M–E Eng'rs, Inc. v. City of Temple,* 365 S.W.3d 497, 503 (Tex. App.–Austin 2012, pet. denied); *Hardy v. Matter*, 350 S.W.3d 329, 333 (Tex. App.–San Antonio 2011, pet. dism'd).

The court of appeals here agreed that the trial court was free to infer Payne's knowledge from sources other than his affidavit and that his certificate of merit was not deficient merely because it failed to show on its face that Payne was knowledgeable of the architects' area of practice. 500 S.W.3d at 435. The court of appeals' opinion, however, does not identify a source for such an inference other than Payne's affidavit. Nor does El Pistolón refer us to anything in the record from which to infer Payne's knowledge or background in the design of shopping centers or other similar commercial construction. Indeed, all that we know about Payne's architectural qualifications and experience is that provided in his affidavit, which does not describe any familiarity with, or knowledge of, defendants' area of practice.

El Pistolón nevertheless argues that we may infer the requisite knowledge and thus Payne's qualifications to render a certificate of merit from Payne's averment that he maintains "an active architecture practice in the State of Texas today." According to El Pistolón, "Payne proved knowledge by showing that he actually used his licensure recently (which not all people do)." The argument assumes that the statute's knowledge requirement is coextensive with its licensure and active-practice requirements. The court of appeals suggested something similar, interpreting the statute's knowledge requirement as simply a recognition of the various design professionals included under the statute. *See* 500 S.W.3d at 436 (noting that "the statute merely requires that the expert be knowledgeable in the defendant's general area of practice, which includes architecture, engineering, landscape architecture, or land surveying"). To test the reasonableness of this construction, we must examine the statute's text.

[4] [5] [6] [7] [8]We review matters of statutory construction de novo. *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006). In construing statutes, our objective is to give effect to the Legislature's intent that we glean from the text, when possible. *Id.* In divining that intent, we further "presume the Legislature chose statutory language deliberately and purposefully." *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 390 (Tex. 2014). We endeavor to interpret each word, phrase, and clause in a manner that gives meaning to them all. *PlainsCapital Bank v. Martin*, 459 S.W.3d 550, 556 (Tex. 2015). We accordingly read statutes as a whole so as to render no part inconsistent, superfluous, or devoid of meaning. *Id.*

As noted, the certificate-of-merit statute imposes several requirements to qualify the third-party expert. The expert must "hold[ ] the same professional license or registration as the defendant." TEX. CIV. PRAC. & REM. CODE § 150.002(a)(2). The expert must be "licensed or registered in this state and actively engaged in the practice ***494** of architecture, engineering, or surveying." *Id.* § 150.002(b). And the expert must be "knowledgeable in the area of practice of the defendant." *Id.* § 150.002(a)(3). Neither El Pistolón nor the court of appeals attributes any independent meaning to the phrase "knowledgeable in the area of practice of the defendant." *Id.* El Pistolón's argument conflates the statute's knowledge and active-practice requirements, while the court of appeals' interpretation conflates the knowledge requirement with the requirement that the third-party expert hold the same professional license or registration as the defendant. *See id.* § 150.002(a)(2), (3), (b) (stating these requirements). Acceptance of either interpretation renders the knowledge requirement superfluous, contrary to our principles of statutory construction. *PlainsCapital Bank*, 459 S.W.3d at 556.

[9] [10]We conclude then that the statute's knowledge requirement is not synonymous with the expert's licensure or active engagement in the practice; it requires some additional explication or evidence reflecting the

expert's familiarity or experience with the practice area at issue in the litigation. Here, we have no such evidence. Although we generally agree that such knowledge may be inferred from record sources other than the expert's affidavit, here the affidavit is all we have of Payne's qualifications. Because nothing exists in Payne's affidavit from which to draw an inference that Payne possessed knowledge of the defendants' area of practice beyond the generalized knowledge associated with holding the same license, we conclude that Payne has not shown himself qualified to render the certificate of merit. And, because the certificate-of-merit statute requires dismissal when the plaintiff fails to file a compliant affidavit, TEX. CIV. PRAC. & REM. CODE § 150.002(e), we conclude the court of appeals erred in affirming the trial court's order denying the motion to dismiss.

The concurring opinion suggests that the Court imposes a condition not contemplated by the statute by requiring there to be some evidence of the expert's knowledge in the practice area at issue. *Post* at 495 (Brown, J. concurring). The concurrence states that the statute's plain text does not require that the expert's qualifications be included in the certificate of merit or that a curriculum vitae be attached thereto, and we agree. *Id.* But the concurrence goes further, stating that evidence of the expert's requisite knowledge need not appear elsewhere in the record. *See id.* ("The plain text of the statute simply does not require ... that the record contain any other extrinsic evidence from which to draw the inference that the affiant was knowledgeable in the area of practice."). With that we disagree because the statute requires such knowledge. And if this information is not included in the certificate of merit, it must be available somewhere else in the record. A trial court cannot assume or infer that an expert knows something about the defendants' area of practice unless there is some evidence to suggest that he does.

III

El Pistolón finally entreats us to remand the case in the interests of justice, if we are otherwise inclined to reverse the court of appeals' judgment. El Pistolón speculates that any opinion in the case "is virtually certain to constitute a prototypical case for [such] a remand" because it will involve "the clarification of uncertain law and the overruling of precedent that litigants had every reason to view as reliable." Our opinion, however, does neither. We merely conclude that the statute sets out several related but distinct qualifications ***495** a third-party expert must possess to render a certificate of merit and that this record fails as a matter of law to demonstrate that the expert met one of the required qualifications. *See, e.g.*, *Jennings, Hackler & Partners, Inc. v. N. Tex. Mun. Water Dist.*, 471 S.W.3d 577, 583–84 (Tex. App.–Dallas 2015, no pet.) (concluding that affidavit was not a sufficient certificate of merit because there was "no evidence that [expert was] knowledgeable in [defendant's] area of practice, as required by § 150.002(a)(3)").

* * *

The certificate-of-merit statute provides that the plaintiff's "complaint against the defendant ... shall result in dismissal" if the plaintiff fails "to file the affidavit in accordance with this section." TEX. CIV. PRAC. & REM. CODE § 150.002(e). The section requires, among other things, that the licensed or registered professional providing the affidavit be "knowledgeable in the area of practice of the defendant." *Id.* § 150.002(a)(3). The record here fails to demonstrate such knowledge (either in the affidavit or elsewhere), and thus the affidavit is non-compliant; it was not filed "in accordance with this section." *Id.* § 150.002(e). The motion to dismiss should therefore have been sustained, and the trial and appellate courts erred in ruling otherwise. The court of appeals' judgment is accordingly reversed, and the cause is remanded to the trial court to determine whether the dismissal mandated here shall be with or without prejudice. *See id.* (providing that the "dismissal may be with prejudice").

Justice Brown filed a concurring opinion.

Justice Brown, concurring.

Though the Court is correct to reverse the court of appeals and render judgment for Levinson, I cannot join its opinion. El Pistolón's certificate of merit, an affidavit sworn out by architect Gary Payne, is deficient because it is conclusory. A certificate of merit must set forth "the factual basis" for each claim of professional liability. TEX. CIV. PRAC. & REM. CODE § 150.002(b). But Payne's affidavit is devoid of substance. Its text could be copied and pasted into any certificate of merit without

regard to the particular facts of the case.

The Court does not base its decision on the certificate's conclusory nature. Instead, the Court renders judgment for Levinson because the record lacks proof of Payne's "knowledge in the area of practice." Ante at 495. The Court holds that "the statute's knowledge requirement ... requires some additional explication or evidence reflecting the expert's familiarity or experience with the practice area at issue in the litigation." Ante at 494. But the text of Chapter 150 contains no such requirement. I agree with those courts of appeals that have noted the statute's silence "as to how and when the third-party architect's qualifications must be established." *Hardy v. Matter*, 350 S.W.3d 329, 333 (Tex. App.–San Antonio 2011, pet. dism'd). "Chapter 150 requires only that a licensed professional, practicing in the same area of expertise as the defendant, provide a sworn written statement certifying that the defendant's actions were negligent or erroneous and stating the factual basis for this opinion." *CBM Eng'rs, Inc. v. Tellepsen Builders, L.P.*, 403 S.W.3d 339, 346 (Tex. App.–Houston [1st Dist.] 2013, pet. denied); *see also* *Dunham Eng'g, Inc. v. Sherwin–Williams Co.*, 404 S.W.3d 785, 794–95 (Tex. App.–Houston [14th Dist.] 2013, no pet.) ("Moreover, the statute does not require the affiant explicitly establish or address that he is 'knowledgeable in the area of practice of the defendant' on the face of ***496** the certificate."). "Indeed, section 150.002 'imposes no particular requirements or limitations as to how the trial court ascertains whether the affiant possesses the requisite knowledge.' " *Dunham Eng'g*, 404 S.W.3d at 795 (quoting *M–E Eng'rs, Inc. v. City of Temple*, 365 S.W.3d 497, 503 (Tex. App.–Austin 2012, pet. denied)).

The majority correctly states that we should presume the Legislature "deliberately and purposefully" chooses the words it uses. Ante at 493. This highlights the difference between subsections (a) and (b) of Chapter 150.002. Subsection (a) requires that the licensed professional submitting the certificate "is knowledgeable" in certain areas; subsection (b) explicitly directs that the negligence and accompanying factual basis "shall [be] set forth specifically" in the affidavit. TEX. CIV. PRAC. & REM. CODE § 150.002 (a)–(b). The plain text of the statute simply does not require that a curriculum vitae be attached to the certificate, that the certificate lay out the affiant's qualifications, or even that the record contain any other extrinsic evidence from which to draw the inference that the affiant was knowledgeable in the area of practice.

The statute requires that the affiant have certain qualifications. But it does not set forth a method for the trial court to determine whether he actually does. Rather than create a scheme on behalf of the Legislature and conclude that the trial court abused its discretion by not employing such a scheme, I would dispose of the case on other grounds. Regardless of whether the affiant in this case possesses the requisite qualifications, his certificate is conclusory. I would render judgment for Levinson on that basis alone.

All Citations

513 S.W.3d 487, 60 Tex. Sup. Ct. J. 464

End of Document

Showing differences between versions effective September 1, 2009 to June 9, 2019 and June 10, 2019 [current]
Key: ~~deleted text~~ added text
5 deletions · **6** additions

V.T.C.A., Civil Practice & Remedies Code § 150.002

§ 150.002. Certificate of Merit

(a) In any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, ~~the plaintiff~~a claimant shall be required to file with the complaint an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who:

(1) is competent to testify;

(2) holds the same professional license or registration as the defendant; and

(3) ~~is knowledgeable~~practices in the area of practice of the defendant and offers testimony based on the person's:

(A) knowledge;

(B) skill;

(C) experience;

(D) education;

(E) training; and

(F) practice.

(b) The affidavit shall set forth specifically for each theory of recovery for which damages are sought, the negligence, if any, or other action, error, or omission of the licensed or registered professional in providing the professional service, including any error or omission in providing advice, judgment, opinion, or a similar professional skill claimed to exist and the factual basis for each such claim. The third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor shall be licensed or registered in this state and actively engaged in the practice of architecture, engineering, or surveying.

(c) The contemporaneous filing requirement of Subsection (a) shall not apply to any case in which the period of limitation

will expire within 10 days of the date of filing and, because of such time constraints, ~~the plaintiff~~a claimant has alleged that an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor could not be prepared. In such cases, the ~~plaintiff~~claimant shall have 30 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires.

(d) The defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of such affidavit.

(e) ~~The plaintiff's~~A claimant's failure to file the affidavit in accordance with this section shall result in dismissal of the complaint against the defendant. This dismissal may be with prejudice.

(f) An order granting or denying a motion for dismissal is immediately appealable as an interlocutory order.

(g) This statute shall not be construed to extend any applicable period of limitation or repose.

(h) This statute does not apply to any suit or action for the payment of fees arising out of the provision of professional services.

Credits

Added by Acts 2003, 78th Leg., ch. 204, § 20.01, eff. Sept. 1, 2003. Amended by Acts 2005, 79th Leg., ch. 189, § 2, eff. May 27, 2005; Acts 2005, 79th Leg., ch. 208, § 2, eff. Sept. 1, 2005; Acts 2009, 81st Leg., ch. 789, § 2, eff. Sept. 1, 2009; Acts 2019, 86th Leg., ch. 661 (S.B. 1928), § 2, eff. June 10, 2019.

V. T. C. A., Civil Practice & Remedies Code § 150.002, TX CIV PRAC & REM § 150.002

End of Document

2018 WL 3029060
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas, Houston (1st Dist.).

JACOBS FIELD SERVICES NORTH AMERICA, INC., Jacobs Engineering Group, Inc., and Jacobs Engineering, Inc., Appellants
v.
Troy WILLEFORD, Appellee

NO. 01-17-00551-CV
|
Opinion issued June 19, 2018

On Appeal from the 127th District Court, Harris County, Texas, Trial Court Case No. 2015-65988

Attorneys and Law Firms

Tracy Glenn, William Patrick Garner, Gregory M. Cokinos, Anthony T. Golz, for Appellants.

Robert J. Montoya, Sondra Sylva, George S. McCall, Robert C. McCabe, Wade Thomas Howard, Michael Tilton, Lori A. Pritchett, William A. Gage, Jr., Michael P. Cash, John Holman Barr, for Appellee.

Panel consists of Justices Bland, Lloyd, and Caughey.

MEMORANDUM OPINION

Russell Lloyd, Justice

***1** In this interlocutory appeal, Jacobs Field Services North America, Inc., Jacobs Engineering Group, Inc., and Jacobs Engineering, Inc. (collectively "Jacobs") appeal from the trial court's order denying its motion to dismiss Troy Willeford's claims of negligence, gross negligence, strict liability, and product defect against them. Jacobs contends that the trial court erred in denying its motion to dismiss because the certificate of merit filed with Willeford's petition fails to meet the requirements of section 150.002 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 150.002 (West 2011). Jacobs also asserts that its motion to dismiss was not untimely and that the trial court was permitted to consider extrinsic evidence in ruling on its motion. We reverse and remand.

Factual and Procedural Background

Willeford sued Jacobs, as well as numerous other entities not parties to this appeal,[1] for injuries he allegedly sustained after responding to the scene of a workplace accident involving his co-worker, Maurice Ware, at the Far East Coker Unit ("FECU") of the ExxonMobil refinery in Baton Rouge, Louisiana.[2] Willeford asserted claims against Jacobs for negligence, gross negligence, strict liability, and product defect.

In his amended petition, under the section entitled "Factual Allegations Regarding the Role of Each Defendant," Willeford alleged, in pertinent part:

> 4.9 **Jacobs Engineering, Inc.** Upon information and belief, Jacobs Engineering, Inc. completed the detailed design for the project to modify the Delayed Coker Unit in February 2007 to reduce the risks associated with manual unheading of the top heads. The factual support for this allegation is found in Mosenteen[3] exhibit 2, p. 1, ¶ 2, as well as in Mosenteen's testimony:
>
> ***Deposition of Jon Mosenteen:***
>
> Q: And was Jacobs Engineering ultimately in charge of the design of that system in 2007 and '8?
>
> ***2** A: To the best of my knowledge, Jacobs Engineering was responsible for the overall design but they had some subcontractors, I believe who were assisting in the—in the design aspect of it.
>
> ....
>
> 4.10 **Jacobs Field Services North America, Inc.** Upon information and belief, Jacobs Field Services North America, Inc. provided programming and HMI configuration and was otherwise heavily involved in the upgrade for the PLCs in the Far East Coker Unit in 2013.[4] The factual support for this is found in

> Mosenteen exhibit 5, pages 60-61 (ExxonMobil Global Services Company procurement identifying Jacobs Engineering Group Inc. and Jacobs Field Services North America Inc. as providing requested work) and in Mosenteen's testimony:
>
> ***Deposition of Jon Mosenteen:***
>
> A: Page 5 of 7 of what I believe is labeled Exhibit 2, Question No. 5, Jacobs Engineering sought to have completed the design programming of the PLC for the 2013 PLC upgrade project.
>
> ....
>
> Q: Detail design, what does that mean?
>
> A: Well, the PLC is a series of, as best I can explain it, a series of yes/no questions and so it's logic that gets you to an end solution or an activity or permissi[on] for something to work. Jacobs provided that programming, provided that service to be able to do that project.
>
> Q: Okay. Did Jacobs actually come on-site?
>
> A: I believe they did.
>
> Q: And so essentially, in Exxon's mind, Jacobs was ultimately responsible for the correct programming of the PLC and HMI, fair?
>
> A: For the correct implementation of the programming, yes, sir.
>
> 4.11 **Jacobs Engineering Group, Inc.** Upon information and belief, Jacobs Engineering, Group, Inc. provided programming and HMI configuration and was otherwise heavily involved in the upgrade for the PLCs in the Far East Coker Unit in 2013.

The ExxonMobil procurement document referenced in Willeford's amended petition identifies Jacobs's scope of work as follows:

> WORK REQUESTED: PROVIDE PROGRAMMING AND HMI CONFIGURATION FOR THE NEW UPGRADED PLC[ ]S FOR THE FAR EAST COKER CUTTING CONSOLES. FOUR NEW PLC[ ]S AND HMI[ ]S WILL BE INSTALLED ONE FOR EACH DRUM, ALSO SITE ACCEPTANCE AND START UP SERVICES WILL BE PROVIDED.[5] PROVIDE INTOOLS WIRING.

To his amended petition, Willeford attached a certificate of merit affidavit of Gregg S. Perkin, a registered professional engineer in the field of mechanical engineering. A copy of Perkin's curriculum vitae and a list of the materials he reviewed in preparing the certificate were attached to his affidavit.

***3** In his affidavit, Perkin stated that he has a Bachelor of Science in Mechanical Engineering and that he is a registered professional engineer in the field of mechanical engineering in the State of Texas. Perkin's affidavit further stated, in relevant part:

> In mid-1986, I began my work as an independent professional Mechanical Engineering consultant.
>
> Since 1995, I have been employed by [Engineering Partners International] as an independent engineering consultant and Professional Engineer in the areas of detailed safety analysis of highly complex process units and systems within the processing industries and risk assessment for various industries. In these regards, and over the course of my professional career, I have actively worked in the areas of equipment design, manufacture, fabrication, assembly, construction, testing, operation, maintenance and retrofitting.
>
> As one (1) of EPI's Principal Engineers, I have often been actively engaged in providing design engineering and independent engineering reviews and analysis. I have been independently retained to conduct product design analysis, design equipment, failure analysis, risk and hazard analysis, and provide other independent consulting services related to mechanical equipment and systems.
>
> ....
>
> Based on my education and professional experience, I have personal knowledge of the acceptable standards for the practice of providing design engineering services in the State of Louisiana which was the task to be performed by the engineering firm(s) referenced herein for ExxonMobil, at the Baton Rouge Refinery where Mr. Ware was severly [sic] injured.

Jacobs filed a motion to dismiss Willeford's claims on the basis that Perkin's certificate of merit affidavit failed to meet the requirements of section 150.002 of the Texas Civil Practice and Remedies Code. Specifically, Jacobs argued that Perkin's affidavit failed to (1) satisfy the "knowledge" requirement; (2) set forth the alleged negligence, errors, or omissions for each defendant; and (3) set forth the factual basis for each such claim. The trial court denied Jacobs's motion, and Jacobs filed this interlocutory appeal.

Standard of Review

An order granting or denying a motion to dismiss for failure to file a certificate of merit is immediately appealable. TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(f) (West 2011). We review a trial court's order denying a motion to dismiss for abuse of discretion. *CBM Eng'rs, Inc. v. Tellepsen Builders, L.P.*, 403 S.W.3d 339, 342 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). A trial court abuses its discretion when it acts arbitrarily or unreasonably, without reference to any guiding rules and principles. *Id.*; *see* *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). A trial court also abuses its discretion if it fails to analyze or apply the law correctly. *Dunham Eng'g, Inc. v. Sherwin-Williams Co.*, 404 S.W.3d 785, 789 (Tex. App.—Houston [14th Dist.] 2013, no pet.). As the party complaining of an abuse of discretion, Jacobs has the burden of bringing forth a record showing such abuse. *See Siemens Energy, Inc. v. Nat'l Union Fire Ins. Co.*, No. 14-13-00863-CV, 2014 WL 2531577, at *2 (Tex. App.—Houston [14th Dist.] June 3, 2014, pet. denied) (mem. op.).

Applicable Law

***4** Chapter 150 of the Civil Practice and Remedies Code governs suits filed against certain licensed professionals, including engineers. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 150.001(1-a) (West Supp. 2017).[6] Section 150.002 provides, in relevant part:

> (a) In any action ... for damages arising out of the provision of professional services by a licensed or registered professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party ... licensed professional engineer ... who:
>
> (1) is competent to testify;
>
> (2) holds the same professional license or registration as the defendant; and
>
> (3) is knowledgeable in the area of practice of the defendant and offers testimony based on the person's:
>
> (A) knowledge;
>
> (B) skill;
>
> (C) experience;
>
> (D) education;
>
> (E) training; and
>
> (F) practice.
>
> (b) The affidavit shall set forth specifically for each theory of recovery for which damages are sought, the negligence, if any, or other action, error, or omission of the licensed or registered professional in providing the professional service, including any error or omission in providing advice, judgment, opinion, or a similar professional skill claimed to exist and the factual basis for each such claim. The third-party ... licensed professional engineer ... shall be licensed or registered in this state and actively engaged in the practice of ... engineering....
>
> ...
>
> (e) The plaintiff's failure to file the affidavit in accordance with this section shall result in dismissal of the complaint against the defendant. This dismissal may be with prejudice.
>
> (f) An order granting or denying a motion for dismissal is immediately appealable as an interlocutory order.

Id. § 150.002.

Analysis

Before we consider whether Perkin's certificate of merit affidavit complies with section 150.002, we address several threshold issues raised by the parties in their briefs.

Applicability of Section 150.002

In his brief on appeal, Willeford contends that although he filed a certificate of merit affidavit with his petition, he did so out of an abundance of caution and his filing does not waive his argument that section 150.002 does not apply to this case. In particular, he argues that Jacobs failed to demonstrate to the trial court that it is a "licensed or registered professional," or that its conduct giving rise to Willeford's claims against Jacobs was committed in the course of "provi[ding a] professional service." *Id.* at § 150.002(a).

In his response to Jacobs's motion to dismiss, Willeford argued that Perkin's certificate of merit complies with section 150.002 because it satisfies the knowledge requirement and adequately sets forth the factual bases for Willeford's claims.[7] Willeford did not argue to the trial court that the statute does not apply to this case.[8] Instead, he challenges the applicability of the statute for the first time on appeal.

***5** To preserve a complaint for appellate review, the record must demonstrate that the complaining party made the complaint to the trial court by timely request, objection, or motion, stating with sufficient specificity the grounds for the requested ruling. *See* TEX. R. APP. P. 33.1(a)(1)(A). Because Willeford did not raise this argument in the trial court, he has not preserved this issue for our review. *See* *E.F. Hutton & Co. v. Youngblood*, 741 S.W.2d 363, 364 (Tex. 1987) (concluding that argument that Deceptive Trade Practices Act was inapplicable to securities transactions was never presented to trial court and was therefore waived); *State v. Wilson*, 490 S.W.3d 610, 622–23 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (concluding that where State did not present four of its five public policy arguments to trial court, it had not preserved those complaints for appellate review); *Robertson Cty. v. Wymola*, 17 S.W.3d 334, 344 (Tex. App.—Austin 2000, pet. denied) (concluding county's claim that it was immune from post-judgment interest not raised at trial court level may not be raised for first time on appeal).

Timeliness of Jacobs's Motion to Dismiss

Willeford argues that the trial court did not err in denying Jacobs's motion to dismiss because the motion was untimely.[9] Jacobs contends that its motion to dismiss was not untimely and that, even if it was, the trial court could not have properly denied Jacobs's motion to dismiss on this ground.[10]

Section 150.002 does not impose a deadline to move for dismissal. *See* TEX. CIV. PRAC. & REM. CODE § 150.002. "When a statute does not contain a deadline, the mere fact that a defendant waits to file a motion to dismiss is insufficient to establish waiver." *Ustanik v. Nortex Found. Designs, Inc.*, 320 S.W.3d 409, 413 (Tex. App.—Waco 2010, pet. denied) (citing *Jernigan v. Langley*, 111 S.W.3d 153, 157 (Tex. 2003)). Willeford concedes that section 150.002 does not impose a deadline. Nevertheless, he argues, Jacobs's filing of its motion approximately six-and-a-half months after Willeford filed his amended petition and after significant discovery had taken place defeats the purpose of the statute and provided the trial court with a sufficient basis upon which to deny Jacobs's motion. Willeford's argument is unavailing.

In *Crosstex Energy Services, L.P. v. Pro Plus, Inc.*, Crosstex, a natural gas compression station owner hired Pro Plus, a licensed professional engineering firm, as the principal contractor to construct a compression station. *See* 430 S.W.3d 384, 387 (Tex. 2014). Following a massive fire that caused $10 million in property damage, Crosstex sued Pro Plus for negligence, negligent misrepresentation, breach of implied and express warranty, and breach of contract. *See id.*

After the statute of limitations had run on Crosstex's negligence claims, and more than seven months after Crosstex had filed its petition, Pro Plus moved to dismiss Crosstex's claims for failure to attach a certificate of merit to its original petition as required by section 150.002. *See id.* Crosstex responded that Pro Plus had waived its right to dismissal by, among other things, substantially invoking the judicial process through participating in discovery. *See* *id.* at 387, 394.

Noting that "[w]aiver is primarily a function of intent," the Texas Supreme Court stated that "[t]o find waiver through conduct, such intent 'must be clearly demonstrated by the surrounding facts and circumstances.' " *Id.* at 393–94 ("We will not find waiver where a person 'says or does nothing inconsistent with an intent to rely upon such right.' "). The Court then concluded that Pro Plus's participation in discovery, specifically, the exchange of 11,000 pages of written discovery between the parties, did not demonstrate an intent to waive the right to dismiss under subsection 150.002(e). *Id.* at 394–95 ("Quite simply, '[a]ttempting to learn more about the case in which one is a party does not demonstrate an intent to waive the right to move for

dismissal.' "). Other courts have similarly refused to find waiver based upon substantially longer delays than the one here. *See, e.g.*, *Found. Assessment, Inc. v. O'Connor*, 426 S.W.3d 827, 833–34 (Tex. App.—Fort Worth 2014, pet. denied) (finding engineer defendants' twenty-two month delay and participation in minimal discovery did not deny them their right to dismissal under section 105.002, noting "we cannot imply waiver based only on delay when the legislature did not provide a deadline for filing a motion to dismiss under section 150.002"); *Ustanik*, 320 S.W.3d at 413–14 (concluding that although defendant engineers waited nearly two years and five months to file motion to dismiss, participated in discovery, and filed motions for summary judgment, conduct did not evidence intent to waive right to assert dismissal under section 105.002); *DLB Architects, P.C. v. Weaver*, 305 S.W.3d 407, 411 (Tex. App.—Dallas 2010, pet denied) (holding defendant architects were not precluded from seeking dismissal under section 105.002 even though they had participated in litigation process and waited more than one year after they were sued to file motion to dismiss). We conclude that the trial court could not have properly denied Jacob's motion to dismiss on this ground.

Compliance with Section 150.002(a)(3)

***6** Jacobs argues that Perkin's certificate of merit affidavit fails to comply with section 150.002(a)(3) because it does not demonstrate that Perkin is knowledgeable in Jacobs's area of practice at issue in this litigation. Specifically, Jacobs argues that nothing in Perkin's certificate of merit, or elsewhere in the record, demonstrates that Perkin is knowledgeable about software engineering or computer programming. Jacobs relies on the Texas Supreme Court's recent decision in *Levinson Alcoser Associates, L.P. v. El Pistolón II, Ltd.*, 513 S.W.3d 487 (Tex. 2017) in support of its argument.

In *Levinson*, El Pistolón hired Levinson (the "architects") to design and oversee the construction of a commercial retail project. *See id.* at 489. Disappointed with the architects' services, El Pistolón sued Levinson, alleging breach of contract and negligence in the project's design and development. *Id.* El Pistolón filed a certificate of merit affidavit of Gary Payne, a third-party licensed architect, with its original petition. *Id.*

The architects moved to dismiss El Pistolón's suit on the grounds that Payne's affidavit did not satisfy the knowledge or factual basis requirements of section 150.002. *See id.* 489–90. The trial court denied the motion to dismiss and the architects appealed. The court of appeals affirmed the portion of the trial court's order denying dismissal of El Pistolón's negligence claim, concluding that Payne's affidavit satisfied both the statute's knowledge and factual basis requirements as to that claim.[11] *See id.* at 490. The architects appealed the decision, arguing that Payne's affidavit was insufficient because Payne was not properly qualified under the statute to give a professional opinion. *See id.* at 491.

The Texas Supreme Court noted that, under section 150.002, a third-party professional is qualified to render a certificate of merit if he (1) holds the same professional license or registration as the defendant; (2) is licensed or registered in the state; (3) is actively engaged in the practice; and (4) is knowledgeable in the defendant's area of practice. *Id.* at 492. The Court concluded that Payne's affidavit satisfied the first three statutory factors under section 150.002—it showed that he was a professional architect, he was registered to practice in Texas, and he was actively engaged in the practice of architecture—but that the affidavit did not provide any information about Payne's knowledge of Levinson's area of practice. *See id.*

The Court explained that "the statute's knowledge requirement is not synonymous with the expert's licensure or active engagement in the practice; it requires some additional explication or evidence reflecting the expert's familiarity or experience with the practice area at issue in the litigation." *Id.* at 494. The Court agreed that such knowledge may be inferred from sources in the record other than the expert's affidavit, and that the certificate of merit was not deficient merely because it failed to show on its face that Payne possessed knowledge of the architects' area of practice. *See id.* at 493–94. It noted, however, that the court of appeals' opinion did not identify a source for such an inference other than Payne's affidavit, and that El Pistolón did not point to "anything in the record from which to infer Payne's knowledge or background in the design of shopping centers or other similar commercial construction." *Id.* at 493. "Because nothing exists in Payne's affidavit from which to draw an inference that Payne possessed knowledge of the defendants' area of practice beyond the generalized knowledge associated with holding the same license, we conclude that Payne has not shown himself qualified to render the certificate of merit." *Id.* at 494.

***7** Jacobs contends that, like El Pistolón, Willeford impermissibly attempts to satisfy section 150.002(a)(3)'s knowledge requirement by relying on Perkin's averments

in his certificate of merit that he is a registered professional engineer in the State of Texas and has been actively engaged in providing engineering services since 1995. *See id.* (explaining that "court of appeals' interpretation conflates the knowledge requirement with the requirement that the third-party expert hold the same professional license or registration as the defendant"). Jacobs argues that, under *Levinson*, Perkin's general knowledge of Jacobs's broad practice area, i.e., engineering, is insufficient to qualify him to render a certificate of merit in this case.

Willeford argues that *Levinson* is distinguishable because the expert in *Levinson* provided no information about his experience, training, practice, qualifications, or knowledge, other than the fact that he was a licensed architect. In contrast, he argues, Perkin states in his certificate of merit that "he has been engaged as an engineer in the areas of detailed safety analysis of highly complex process units, including the areas of equipment design, manufacture, fabrication, assembly, construction, testing, operation, maintenance and retrofitting." Willeford also points out that Perkin "describes how he has 'almost 50 years of experience in rotary drilling operations,' his clientele includes energy and related industries and the oil and gas industry," and that Perkin states "based on my education and professional experience, I have personal knowledge of the acceptable standards for the practice of providing design engineering services in the State of Louisiana which was the task to be performed by the engineering firm(s) referenced herein for ExxonMobil, at the Baton Rouge Refinery, where Mr. Ware was severly [sic] injured." Willeford argues that *Dunham Engineering*, rather than *Levinson*, is more on point with this case.

In *Dunham Engineering*, the City of Lake Jackson hired Dunham Engineering, Inc. ("DEI") to design and produce engineering plans and specifications, and a draft set of contract documents for the repainting and rehabilitation of a 500,000 gallon water tower. *See id.* at 788. The City also hired DEI to advertise for contractor bids on, and assist the City in reviewing the bids and selecting the winning bid for, the project. *Id.*

After DEI turned down Sherwin-Williams's request to substitute its paint products for the paint products DEI had specified because DEI did not consider Sherwin-Williams's products to be "equal," Sherwin-Williams sued DEI, asserting claims of intentional interference with prospective business relationships, business disparagement, and product disparagement. *See id.* To its original petition, Sherwin-Williams attached a certificate of merit affidavit of James O'Connor, a licensed professional civil engineer and engineering professor. *Id.* DEI moved to dismiss Sherwin-Williams's suit, arguing that its certificate of merit affidavit failed to meet the requirements of section 150.002. *Id.* at 789. The trial court denied DEI's motion, and DEI appealed. *Id.*

The court of appeals rejected as an overly narrow construction DEI's argument that O'Connor's certificate of merit affidavit was insufficient because it did not demonstrate that he was knowledgeable in "professional engineering services related to water storage tanks and corrosion control." *See id.* at 794. "[W]hat DEI proposes is that section 150.002(a)(3) requires that we evaluate certificates of merit on the basis of engineering specialties. However, the plain language of ... section 150.002(a)(3) ... specifically states only that the engineer opining in the certificate of merit be 'knowledgeable in the area of practice of the defendant.' " *Id.*

***8** The court noted that O'Connor's certificate indicated that he held a Ph.D. in civil engineering, was licensed by the State of Texas as a professional civil engineer, served as a professor in project management within the civil engineering department at the University of Texas, and that, through his practice, research, and teaching, he was familiar with the legal requirements and industry customs regarding competitive bidding on public works projects. *Id.* at 795. Noting that DEI was involved in the preparation and direction of plans and specifications for a Texas public works project, the court concluded that the trial court had not abused its discretion in determining that O'Connor was knowledgeable in DEI's area of practice. *See id.*

Jacobs argues that *Dunham Engineering* does not support Willeford's position because, unlike the defendant there, Jacobs does not contend that Perkin lacks knowledge of an engineering "specialty." For example, Jacobs contends, it does not assert that Perkin lacks knowledge of computer programming and software engineering for control of industrial machinery in oil refineries, as opposed to industrial machinery in other applications. Rather, it argues that "Perkin lacks knowledge of computer programming and software engineering for control of industrial machinery, period."

In his amended petition, Willeford alleges that Jacobs "provided programming and HMI configuration" for the four new upgraded PLCs in the Far East Coker Unit, and that it completed the detail design for the project. He further alleges that Jacobs "engaged in defective work related to designing, wiring, installing, constructing, and programming the coker unit's PLCs, HMI's load cells,

and failed to ensure the functionality of its work and the unit as a whole following its work."

In support of his allegations, Willeford relies on Mosenteen's deposition testimony and the ExxonMobil procurement document identifying Jacobs's scope of work on the project. Mosenteen testified that Jacobs was responsible for the programming of the PLCs and HMI, and that "detail design" refers to the design and development of the logic underlying the software program Jacobs wrote for the upgraded PLCs. Similarly, the procurement document identifying Jacobs's scope of work on the project states that Jacobs was to "provide programming and HMI configuration for the new upgraded PLCs for the Far East Coker Cutting Consoles," and that site acceptance and start up services and intools wiring would be provided.

There is nothing in Perkin's certificate of merit, or elsewhere in the record, showing that Perkin is knowledgeable about computer programming or software engineering for control of industrial machinery, Jacobs's practice area at issue. Notably, Perkin states, "I am informed that the PLC and/or HMI providing all/or some of this information to a DCSU [Delayed Coker System Unit] Operator was not fully functioning." There is no mention in the certificate of designing, wiring, installing, constructing or programming PLCs, HMIs, or load cells, nor is there any mention of acceptance testing of PLCs or HMIs.[12] Neither Perkin's background nor his active practice reflects knowledge, experience, education, or training in computer programming, software engineering, PLC programming, HMI configuration, or site acceptance testing of PLCS and HMIs. Instead, Perkin's certificate shows that he is a mechanical engineer with experience in, and familiarity with, mechanical systems, in particular, equipment design, manufacture, fabrication, assembly, construction, testing, operation, maintenance, and retrofitting.[13]

***9** Willeford argues that Jacobs mischaracterizes his claims as claims about coding or software design. He asserts that his claims center on the failure to implement certain safety features, mechanical design flaws, and the failure to conduct adequate site acceptance testing and other testing of the mechanical components of the PLC and HMI. However, the record shows that these duties were not within Jacobs's scope of work on the project. To its motion to dismiss, Jacobs attached the affidavit of Franz Rosenthal, an instrument engineer with ExxonMobil Chemical Corporation, who was responsible for the Far East Coker Unit upgrade in 2013. Rosenthal averred, in pertinent part:

> 2. While at ExxonMobil, we tested any new equipment installed at the Far East Coker unit for functionality to ensure it met ExxonMobil's design, specifications, and performance criteria. Jacobs was responsible for developing the site acceptance test procedures. As part of the installation and verification process, ExxonMobil would perform a site acceptance test (SAT).
>
> 3. ExxonMobil hired Jacobs to provide input/output list and the programming for the programmable logic controllers (PLCs) and the human machine interface (HMI) for the 2013 Far East Coker unit cutting consoles upgrade (FECU). [ ] PLCs are configurable mini-computers that usually have electrical signals wired into them and are used to control processes. The PLC runs software as a personal computer. Jacobs developed and installed the program used in the PLCs for FECU, using a language specific for that purpose.
>
> 4. Site acceptance services means to provide support services to ExxonMobil during site acceptance testing that was performed by ExxonMobil. Jacobs was not specifically contracted to perform the site acceptance test on the 2013 FECU. Jacobs was responsible for ensuring the PLCs operated per ExxonMobil's design and performance criteria. The PLCs complied with all of ExxonMobil's design and performance standards. ExxonMobil personnel performed the SAT and Jacobs was there primarily in an advisory capacity if issues arose. The SAT was successfully completed to ExxonMobil's satisfaction.

Thus, while its duties included providing site acceptance services, including developing the procedures for site acceptance testing, Jacobs did not conduct site acceptance testing or testing of other equipment at the FECU. ExxonMobil did.

Willeford also asserts that Jacobs's claim that a software engineer is necessary to render a certificate of merit in this case fails as a matter of law. It is true that a third-party expert need not practice in the same practice area at issue to be knowledgeable to render an opinion under the statute. *See* *Levinson*, 513 S.W.3d at 492–93; *Gaertner v. Langhoff*, 509 S.W.3d 392, 397 (Tex. App.—Houston [1st Dist.] 2014, no pet.). However, Jacobs does not make this argument. Rather, it contends that Perkin does not satisfy the "knowledge" requirement because there is nothing in the record indicating that Perkin is knowledgeable in Jacobs's specific area of practice. *Compare* *Levinson*, 513 S.W.3d at 493 (concluding that expert had not shown himself qualified

to render certificate of merit where there was nothing in record from which court could infer expert's knowledge or background in defendant architects' practice area, i.e. design of shopping centers or other similar commercial construction), *with* *Melden & Hunt, Inc. v. East Rio Hondo Water Supply Co.*, 520 S.W.3d 887, 891 (Tex. 2017) (agreeing with court of appeals that expert's averments of many years of experience "in master planning, detailed design and construction management," and about his "education and experience in the design and analysis of water treatment plants, including clarifiers, pumps, filters, piping, controls, and chemical fees systems" were factual statements supporting conclusion that expert was knowledgeable in defendant engineer's practice area), *and* *Dunham Eng'g, Inc.*, 404 S.W.3d at 795 (concluding section 150.002(a)(3) was satisfied where expert's affidavit indicated that through practice, research, and teaching, he was familiar with legal requirements and industry customs regarding competitive bidding on public works projects like those at issue), *and* *M–E Eng'rs, Inc. v. City of Temple*, 365 S.W.3d 497, 501, 504 (concluding district court did not abuse its discretion in determining that expert was knowledgeable in defendant engineer's practice area where expert averred in his certificate that he practiced in same design of heating, ventilating, air conditioning systems, and plumbing systems as defendant, and other facts tended to confirm expert's knowledge such as his descriptions and analysis of eleven sets of identified problems in building's HVAC system).

***10** Willeford's argument is essentially that because the system failed, every component of the system failed. That may or may not be true, but Jacobs has broken its component of the system out of the system and challenged Willeford to show in what particular way it failed. The first step Willeford must take is to satisfy the requirements of section 150.002 with a certificate of merit which demonstrates that the expert called upon to criticize the computer programming and installation is qualified to do so. There is nothing in Perkin's curriculum vitae or his affidavit showing that he possesses knowledge regarding the role that computer programming played in the system's alleged failure. While Perkins is, based on his certificate of merit, qualified to review and criticize the coordination, design, and functioning of complex refinery systems, there is nothing in the record which indicates his expertise in the area of computer programing, design, or installation. The certificate of merit does not meet the standards of section 150.002 with regard to Jacobs.

Because nothing exists in Perkin's certificate of merit affidavit, or elsewhere in the record, indicating that Perkin possesses knowledge of Jacobs's practice area, Perkin has not shown himself qualified to render the certificate of merit. The trial court erred in denying Jacobs's motion to dismiss. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(e) (requiring dismissal when plaintiff fails to file compliant affidavit). Accordingly, we sustain Jacobs's issue.[14]

Conclusion

We reverse the trial court's order denying Jacobs's motion to dismiss, and we remand the cause to the trial court to determine whether the dismissal of Willeford's claims shall be with or without prejudice. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(e) (providing that dismissal based on plaintiff's failure to file certificate of merit in accordance with statute "may be with prejudice").

All Citations

Not Reported in S.W. Rptr., 2018 WL 3029060

Footnotes

1 The other named defendants are ExxonMobil Corporation, ExxonMobil Research & Engineering Company, ExxonMobil Refinery & Supply Company, Siemens Industry, Inc., AWC, Inc., Flowserve Corporation, Hydradyne, LLC, ISC, Constructors, LLC, Konecranes, Inc., NorWest Hydraulic & Pneumatic, Inc., Triad Control Systems, L.L.C., Triad Electric & Controls, Inc., ExxonMobil Global Services Company, Bayside Engineering Group, Inc., and Vallourec Drilling Products USA, Inc. f/k/a VAM Drilling USA, Inc.

2 On November 27, 2014, Ware was working at the FECU when the cable from a free falling bit and drill stem struck him, amputating his legs. After Ware filed suit, Jacobs moved to dismiss his claims against it under Chapter 150 of

the Texas Civil Practice and Remedies Code. The trial court denied the motion, and Jacobs appealed. On November 21, 2017, the Fourteenth Court of Appeals issued a memorandum opinion dismissing the appeal for lack of jurisdiction. *Jacobs Field Servs., N. Am., Inc. v. Ware*, No. 14-17-00543-CV, 2017 WL 5618192 (Tex. App.—Houston [14th Dist.] Nov. 21, 2017, no pet.). The parties later settled.

[3] Mosenteen, an ExxonMobil employee, was the coker operations supervisor in Baton Rouge at the time of the accident.

[4] "PLC," or Programmable Logic Controller, is a specialized industrial computer which has been specifically designed to operate reliably in harsh usage environments and conditions, such as refineries and manufacturing. "Programming" a PLC means writing the software that controls the way the PLC behaves. "HMI," or Human Machine Interface, is the graphical user interface for the PLC which allows the PLC to communicate with the operator. "Configuring" an HMI means using a graphical computer programming language to create the HMI.

[5] The site acceptance service refers to the development of site acceptance test procedures used during site acceptance testing performed by ExxonMobil. Jacobs was not responsible for performing the site acceptance test.

[6] Willeford filed his original petition on November 3, 2015. Because the underlying lawsuit was filed after September 1, 2009, the pertinent version of section 150.002 is the 2009 amended version. *See* Act of May 29, 2009, 81st Leg., R.S., ch. 789, § 2, 2009 Tex. Gen. Laws 1991, 1992 (codified at TEX. CIV. PRAC. & REM. CODE § 150.002).

[7] In his response, Willeford referred to Jacobs as a licensed engineering firm and stated that "§ 150.002 sets forth a minimal threshold requirement that a plaintiff must satisfy when suing a licensed engineer for an action that arises out of the provision of professional services."

[8] On appeal, Willeford acknowledges that "[t]he record does not indicate that the trial court considered the applicability of CPRC § 150.002 in denying Jacobs' motion to dismiss."

[9] In a footnote in his response to Jacobs's motion, Willeford similarly asserted that "[i]t seems that Jacobs' motion, at this stage of the litigation, is tardy and defeats the initial gatekeeping function intended by the statute."

[10] The trial court's order does not state the basis on which it denied Jacobs's motion to dismiss.

[11] The court reversed the trial court's order as to the contract claim, concluding that Payne's affidavit was deficient as to that claim, and it remanded for the trial court to determine whether the contract claim should be dismissed with or without prejudice. *Levinson Alcoser Assocs., L.P. v. El Pistolón II, Ltd.*, 513 S.W.3d 487, 490 (Tex. 2017).

[12] Perkin does not identify the PLC software program written by Jacobs, ExxonMobil's specifications for that program, or the site acceptance test procedures written by Jacobs for the upgraded PLCs and HMIs as being among the materials he reviewed in rendering his certificate of merit. *See* *M-E Eng'rs, Inc. v. City of Temple*, 365 S.W.3d 497, 504 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (noting that certificate of merit reflected that, in forming his opinions, expert had read project specifications and drawings, assessed whether HVAC system complied with those documents, and determined, based on his training and experience, whether HVAC system, as actually installed, functioned properly as part of project).

[13] Perkin summarizes his minimal expectations for the DSCU drilling operations, based on his "almost fifty years of experience in rotary drilling operations," in eleven bullet points in his certificate of merit. These points, however, address mechanical design and procedural issues, none of which are related to the activities within Jacobs's scope of work. *See id.* at 503 (concluding that trial court could have considered, among other facts, expert's descriptions and analysis of eleven sets of identified problems in building's HVAC system that he attributed to defendant engineer).

[14] In light of our disposition, we need not reach Jacobs's issues regarding whether Perkin's certificate of merit specifically addresses Jacobs and its conduct, as required by section 150.002(b), or whether the trial court was permitted to consider the affidavit of Jacob's engineering expert, Richard Hooper, attached to its motion to dismiss.

End of Document

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Richard Capshaw on behalf of Stanhope Denegre
Bar No. 24014734
anna@capslaw.com
Envelope ID: 47653194
Status as of 10/29/2020 3:30 PM CST

Associated Case Party: Certain Underwriters at Lloyd's of London Subscribing to Policy No. NAJL05000016

Name	BarNumber	Email	TimestampSubmitted	Status
Paul BHines		phines@dt-law.com	10/29/2020 3:22:49 PM	SENT
Evan J.Malinowski		emalinowski@dt-law.com	10/29/2020 3:22:49 PM	SENT
Michael R.Marx		mmarx@dt-law.com	10/29/2020 3:22:49 PM	SENT
Felicia Tyson		ftyson@dt-law.com	10/29/2020 3:22:49 PM	ERROR
Davette Seldon		dseldon@dt-law.com	10/29/2020 3:22:49 PM	SENT

Associated Case Party: KK Builders, LLC, D'Amato Conversano, Inc d/b/a DCI Engineers, 1113 Structural Engineers, PLLC and Mayse & Associates, Inc.

Name	BarNumber	Email	TimestampSubmitted	Status
Sachi A,Dave		sdave@patellegal.com	10/29/2020 3:22:49 PM	SENT
William Luyties		wkl@lorancethompson.com	10/29/2020 3:22:49 PM	SENT
Mark Youngjohn		myoungjohn@donatominxbrown.com	10/29/2020 3:22:49 PM	SENT
Richard A.Capshaw		richard@capslaw.com	10/29/2020 3:22:49 PM	SENT
Stanhope B.Denegre		stan@capslaw.com	10/29/2020 3:22:49 PM	SENT